

AN
Historical and Political
DISCOURSE
OF THE
Laws and Government
OF
ENGLAND,

FROM THE
FIRST TIMES to the End of the REIGN

OF
QUEEN *ELIZABETH.*

With a Vindication of the Antient Way
of Parliaments in *England.*

Collected from some Manuscript Notes of JOHN SELDEN, Esq;
By *NATHANIEL BACON*, of *Grays-Inn*, Esq;

THE FIFTH EDITION:

Corrected and Improved by a GENTLEMAN of the *Middle-Temple.*

L O N D O N,

Printed for D. BROWNE, and A. MILLAR, in the *Strand.*
MDCCLX.

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LONDON

Printed for J. DODD, at the Golden Ball in Pall-mall; and for J. KNEELAND, at the Black-Swan in St. Dunstons Church; and for J. HARRISON, at the Crown in St. Pauls Church-yard.

ADVERTISEMENT to the EDITION Publish'd in 1688-9.

THis *Book* at its first *Publishing*, which was shortly after the Death of *King Charles the First*, had the ill-fortune to be coldly received in the World, by reason of the Circumstances of those Times; but after *King Charles the Second* was possess'd of the *Crown*, and endeavoured to advance the *Prerogative* beyond its just bounds, the *Book* began to be much enquired after, and look'd into by many *Learned Men* who were not willing to part easily with their *Birth-Rights*, so that in a short time it became very scarce, and was sold at a great rate: This occasion'd the private Reprinting of it in the year 1672, which as soon as the Government perceiv'd they prosecuted both the *Publisher* and the *Book* so violently, that many hundreds of the *Books* were seized and burnt. That and the great want of the *Book* since, occasioned the Reprinting of it (without any *Alterations* or *Omissions*) in the year 1682, when the Press was at liberty by reason of the ceasing of the Act for Printing; but *Prerogative* then getting above the *Law*, it met with a new Persecution, and the *Publisher* was indicted for the Reprinting of it; the *Passages* in it upon which the *Indictment* was found, were these: Part II. Page 76. Line the 23d, thus, *I do easily grant that Kings have many occasions and opportunities to beguile their people; yet can they do nothing as Kings, but what of Right they ought to do. They may call Parliaments, but neither as often or seldom as they please, if the Statute Laws of this Realm might take place.* And, Part II. Page 148. Line 27. *And though Kings may be Chief Commanders, yet they are not the Chief Rulers.* The Prosecution went on so rigorously, that the *Publisher*, tho' beyond the Seas, yet willing to try the *Cause*, appeared according to the constant practice of the Court of *King's-Bench*, by his *Attorney*; but for not being personally present in the Court, (which was then impossible, he was by the Arbitrary Power of the then *Lord Chief Justice Jefferys* Out-law'd for a *Misdemeanour*, and so remain'd till this wonderful Revolution, by the wise Conduct of his Highness the *Prince of Orange*.

The *Books* have been ever since with care and charge preserved, for the benefit of all that are willing to know and maintain their antient *Laws* and *Birth-Rights*.

It was well known to, and owned by, the late *Lord Chief Justice Vaughan*, who was one of the *Executors* of the Great and Learned Mr. *Selden*, that the *Ground-work* was his, upon which Mr. *Bacon* rais'd this *Superstructure*, which hath been and is so well esteem'd, that it is now again made publick, by

January the 10th,
1688-9.

John Starkey.

N. B. The Reader is desired to observe, That whatever he finds in the Text betwixt *Brackets* [] were Omissions in the Folio Edition printed in 1682, (which was republished in Jan. 1688-9) and are now inserted from the Quarto Edition of 1649. The Notes both in the Side-Margin and Bottom, which are mark'd with the References *, †, or ||, were added by a Gentleman of the *Middle-Temple*, and were first printed in the Edition of 1739.

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THE FIRST PART.

From the FIRST TIMES till the Reign of
EDWARD III.

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 Private Debate concerning the Right of an *English King* to the Arbitrary Rule over *English Subjects*, as Successor to the *Norman Conqueror*, (so called) first occasioned this Discourse. Herein I have necessarily fallen upon the *Antiquity* and *Uniformity* of the *Government* of this *Nation*: which being cleared, may also serve as an *Idea* for them to consider, who do mind the restitution of this shattered Frame of Policy. For as in all other Cures, so in that of a distempered Government, the Original Constitution of the Body is not lightly to be regarded; and the contemplation of the Proportion of the Manners of the Nation in a small Model, brings no less furtherance to the right apprehension of the true nature thereof (besides the delight) than the perusing of a Map doth to the Traveller, after a long and tedious travel.

I propound not this Discourse as a Pattern drawn up to the life of the thing, nor the thing itself as a masterpiece for future Ages: for well I know, that Commonwealths in their minority want not only perfection of Strength and Beauty, but also of Parts and Proportion; especially seeing that their full age attaineth no further growth, than to a mixture of divers forms in one. Ambition hath done much by Discourse and Action to bring forth Absolute *Monarchy* out of the Womb of Notion; but yet, like that of the Philosopher's Stone, the issue is but wind, and the end misery to the undertakers: And therefore more than probable it is, that the utmost perfection of this Nether-world's *best Government*, consists in the upholding of a due proportion of several Interests, compounded into one temperature.

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He that knoweth the secrets of all Mens Hearts, doth know that my aim in this Discourse is neither at *Scepter* or *Crozier*, nor after *Popular* Dotage, but that Justice and Truth may moderate in all. This is a Vessel, I confess, ill and weakly built, yet doth it adventure into the vast Ocean of your Censures, Gentlemen, who are *Antiquaries*, *Lawyers* and *Historians*; any one of whom might have steered in this course much better than myself. Had my own credit been the freight, I must have expected nothing less than wreck and loss of all; but the main design of this Voyage being for discovery of the true nature of this *Government* to common view, I shall ever account your just Censures and Contradictions (especially published with their grounds) to be my most happy return, and as a Crown to this Work: And that my labour hath its full reward, if others, taking advantage by my imperfections, shall beautify *England* with a more perfect and lively Character.

Water: which being closed, may also serve as an emblem to consider, who do mind the constitution of this limited frame of Policy. For as in all other Cases, so in that of a dispersed Government, the Original Constitution of the Body is too highly to be regarded; and the consideration of the Proportion of the Members of the Nation in a small Model, brings no less assistance to the right apprehension of the true nature thereof (besides the delight than the perusing of a Map doth to the Traveller, after a long and tedious travel.

I proposed not this Discourse to draw up to the life of the thing, nor the thing itself as a masterpiece for future Ages: for well I know, that Commentaries in their infancy want not only perfection of strength and Beauty, but also of form and Proportion: especially seeing that their full age attaineth no further growth, than to a mixture of divers forms in one. Ambition hath done much by Discourse and Action to bring forth Absolute Monarchy out of the Womb of Liberty; but yet, like that of the Philosopher's Stone, the issue is but wind, and the end misery to the undertakers: And therefore more than probable it is, that the perfection of this *British* world's *Constitution*, consists in the holding of a due proportion of several Interests, compounded into one temperature.

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THE
P R E F A C E.

TH E Policy of the English Government, (so far as it is praiseworthy,) is all one with Divine Providence wrapped up in a Veil of Kings, and Wise men; and thus implicitly hath been delivered to the World by Historians, who for the most part read Men, and wear their Pens in decyphering their Persons and Conditions: Some of whom, having met with ingenious Writers, survive themselves, possibly more famous after death than before: Others, after a miserable Life wasted, are yet more miserable in being little better than Tables to set forth the Painters Workmanship, and to let the World know, that their Historians are more witty, than they, of whom they wrote, were either wise or good. And thus History, that should be a witness of Truth and Time, becomes little better than a Parable, or rather than a Nonsense in a fair Character, whose best commendation is, that it is well written.

Doubtless, Histories of Persons, or Lives of Men, have their excellency in Fruit, for imitation and continuance of Fame, as a reward of Vertue: yet will not the coacervation of these together declare the nature of a Commonwealth better, than the beauty of a Body dismembred is revived, by thrusting together the Members which cannot be without deformity. Nor will it be denied, but many wise and good Kings and Queens of this Realm, may justly challenge the honour of passing many excellent Laws, (albeit it is the proper work of the Representative Body to form them) yet to no one, nor all of them, can we attribute the honour of that Wisdom and Goodness that constituted this blessed Frame of Government. For seldom is it seen that one Prince buildeth upon the foundation of his Predecessor, or pursueth his ends or aims; because as several Men, they have several Judgements and Desires, and are subject to a Royal kind of Self-love, that inciteth them, either to exceed former Precedents, or at least to differ from them, that they may not seem to rule by Copy, as insufficient of themselves, which is a kind of disparagement to such as are above.---Add bereunto, that it is not to be conceited that the wisest of our Ancestors saw the Idea of this Govern-
ment

ment ; nor was it any where in precedent but in him that determined the same from Eternity : For as no Nation can shew more variety and inconstancy in the Government of Princes than this, especially for three hundred years next ensuing the Normans : So Reason cannot move Imagination, that these Wheels, by divers, if not contrary motions, could ever conspire into this temperature of Policy, were there not some primum mobile that hath ever kept one constant motion in all.

My aim therefore shall be to lay aside the consideration of Man as much as may be, and to extract a summary view of the Cardinal Passes of the Government of this Kingdom, and to glance at the various Aspects of the ancient upon the modern, that so these divers Princes, and wise Councils in their different course, may appear to be no other than the instruments of him that is but one, and of one mind, whose goings forth have been in a continual course of Wisdom and Goodness for our selves in these latter days. And herein I am encouraged, because I am not in danger of temptation to Flattery or Spleen, nor pinched with Penury of grounds of observation ; having to do with a Nation, than which a clearer mirror of God's gracious Government is not to be found amongst all the Nations and People under Heaven.

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940	100	100
950	100	100
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970	100	100
980	100	100
990	100	100
1000	100	100

OF THE LAWS and GOVERNMENT

PART the FIRST.

CHAPTER I.

Of the BRITONS, and their Government.

* See *Sams's*
Britannia, in
Præf. &c.

Cæf. Com. lib.

Tacit. Ann. 14

Amian. lib. 15.

Caf. Com.lib.

10. (20) :

Tacit.

In their civil Government they allowed preeminence to their Magistrates rather than Supremacy, and had many Chiefs in a little room; the *Romans* called them little Kings, for the greater renown of their Empire. But others of more sobriety account them no better than Lords, of Liberties, not much exceeding those of a City; and these (though in time of peace independant upon each other, yea perpetual Enemies, yet) in time of foreign War, joined together to chuse one Head

to

A N
Historical and Political Discourse
O F T H E
L A W S and G O V E R N M E N T
O F
E N G L A N D.

PART the FIRST.

C H A P. I.

Of the BRITONS, and their Government.

THIS is *Britain*, or rather that part thereof, in after-ages called *Saxony* and *England*, from the people's Names transplanted thither. The *Britons* (to lay aside all conceits of Fame) I take to be an issue of the neighbouring Nations, from the *German* and *Belgick* shores^{*}; induced hereto, partly by the vicinity of the Names of the People, Cities, or Towns and Places, but more of their Manners and Customs, both in Religion and Civil Government. *Barbarians* they were, and so esteemed by the *Romans*, that were but refined *Barbarians* themselves, and yet they worshipped an Invisible, Infinite, Omnipotent God by Sacrifices: but the greatest part of their reverence fell short, and rested upon their Priests, whom they accounted the only Secretaries that God had on earth, feared their interdict worse than death itself, and (in these times of uttermost darkness) held them forth to neighbouring Nations, to instruct them into an higher excellency than that of brutish men.

In their civil Government they allowed preeminence to their Magistrates rather than Supremacy, and had many Chiefs in a little room; the *Romans* called them little Kings, for the greater renown of their Empire. But others of more sobriety account them no better than Lords, of Liberties, not much exceeding those of a City; and these (though in time of peace independant upon each other, yea perpetual Enemies, yet) in time of foreign War, joined together to chuse one Head

B

to

^{*} See *Sam's* *Britannia*, in *Præf. &c.*

Cæf. Com. lib.

Tacit. Ann. 14

Amian. lib. 15

Cæf. Com. lib.

Tacit.

Cæf. Com. lib.

Cæf. Com. lib. 6. to command them all, (according to the custom of the Germans) as *Cæfar* noteth. But that which yet cleareth the matter, is the testimony of *Dion* in the Life of *Severus* the Emperor, who expressly saith, *That in Britain the People held the Helm of Government in their own power.* So as these were not Kings; nor their Government Monarchical, and yet might be regular enough, considering the rudeness that in those days overspread the world. True it is, that by a holy man *Hierom.* this nation was in latter times of Barbarism, called *Tyrannorum gens*, the word being taken *mitiori sensu*, or from a common repute of excessive cruelty, or oppression by Superiours. As touching their Cruelty, I find no footsteps in story: Somewhat reflecteth upon their Sacrifices, as if they offered Man's flesh; but that was common to the *Gauls*, who borrowed their Religion from *Britain*; and it might be founded rather upon an error in judgment, than savageness of nature. *Cæf. Com. 6.* Much less cause doth appear of any cry of oppression upon inferiours, but rather against that; as the multitude of Kings or Lords do manifestly witness; who being observed in the time of *Julius Cæsar*, continued in *Tiberius's* time and afterwards, until in the Reign of *Claudius* 'tis said, that *Caractacus* ruled over many Nations. For it is a certain Maxim, that though great Nations may be upholden by power, small Territories must be maintained by justice; without which, the door will be soon set open to the next passenger that comes; especially where the people are bent to war, as these were, and therein had attained such exquisite perfection of skill in Chariot-service, as must needs convince us of their much experience against themselves, in regard that to other people it was scarce known; no, nor yet to *Cæsar* himself, that had been practised in the Wars of all Nations. *Tacit.* And this is all that I can produce out of story, touching the Government of *Britain*, before the entry of that Light that lightneth every one that cometh into the world*.

C H A P. II.

Concerning the Conversion of the BRITONS unto the Faith.

IT was long before the Son of God was inwombed, and whiles as yet Providence seemed to close only with the Jewish Nation, and to hover over it, as a choice picked place from all the earth, that with a gracious eye surveying the forsaken condition of other Nations, it glanced upon this Island; both thoughts and words reflected on *Isles*, *Isles of the Gentiles*, *Isles afar off*, as if amongst them the Lord of all the earth had found out one place that should be to him as the Gemme of the Ring of this Terrestrial Globe: and if the ways of future providence may be looked upon as a gloss of those Prophecies, we must confess that this Island was conceived in the womb thereof, long before it was manifested to the world.

Is. 42. 4.
51. 5.
60. 9.
66. 19.

To recover the forgotten ways of past providence, is no less difficult, than to search out the hidden bowels of future promises; and therefore I shall not busy my self to find out the particular instruments that brought God's presence into this dark corner, but only glance at the time and manner, that it may appear we were not forgotten, nor yet lost, or least in mind, at that time of the dispensation of this grace unto all men. I dare not instance, as *Gildas*, the certain time of six years; yet I may say, that no sooner was the Scepter departed from *Judah*, but with a swift

* See Bishop *Usher*, *De Primordiis Ecclesiar. Brit.* cap. 1, & 16. *Stillington's Originis Sacra*, p. 35, 36, &c.

swift pace, both it and the Law-giver came hither like an Arrow flying through other Countries, but sticking with a *ne plus ultra* in this Island, (then a People rather than a Commonwealth) as if we were the only White that then was in God's aim. It's probable in the highest degree that the work was done within the first Century, and very nigh about the Apostolick times†; for that in the second Century Britain was a Church of Fame, and known to the Fathers that dwelt afar off, even to *Tertullian* and *Origen**, and in short time had outreached the Roman confines in that Island, (which had cost them above two Hundred years Travel) and was grown to the state of the first Christian Kingdom that ever was. Unto which, if we shall allow time for the gathering and growth thereof unto this Royal pitch, proportionable to the half of that which afterward was spent in the like work, upon the *Saxon* and *Danish* Kings, we must in reason conclude that the work was first ordered by Apostolical direction, or some of their Emissaries. Customs also do not obscurely declare Ages. For before that *Pius* Bishop of *Rome* began to speak in the big Language of Decrees, it was indifferent to keep *Easter* either upon the day observed by the *Roman* Church, or on the day according to the Jews custom: and although the *Roman* Church began within fifty years after the death of *John* the Evangelist, to stickle, to impose their custom upon other Churches; yet the Church of *Britain* conformed not to that course by the space of five Hundred years after that time; which reflecteth probability, that the Church was here settled in times of indifferency, not by *Roman* Order, but by some other purposed Messenger.

The manner yet is more remarkable; for that not only Principalities and Powers, and Spiritual Wickednesses in high places, (which are but Stumbling-blocks) but also the natural wisdom of the *Druids* (who were Masters of the Consciences of the *Britons*, and their high conceit of their excellency above the ordinary strain of men, and unto which the Cross of Christ is meer foolishness; and above all, the deep obligation of the People unto these their Rabbies, in a Devotion beyond the reach of other Nations: All these, I say) stood in the way, and rendred the people more incapable of any new Light. But when the time fore-set is fully come, all Mountains are laid low, and double-folded Doors fly open; and this Conqueror of all Nations attempts *Britain*, not in the Rear, nor by undermining, but assails them in their full strength, presents in a clear Sun-shine that one true Sacrifice of God-man; at the appearing whereof, their shadows of many Sacrifices of man's flesh fly away. And thus those *Druids* that formerly had dominion of the *Britons* Faith, become now to be helpers of their joy, and are become the leaders of the blind people in a better way, and unto a better hope; and held forth that Light which through God's mercy hath continued in this Island ever since, through many Storms and dark Mists of time, until the present Noon-day.

C H A P. III.

Of the Entry of the Romans into Britain, and the State thereof during their Continuance.

THIS conversion of the *Druids* was but the first step to that which followed; for the Decree was more full of grace, than to make this Isle to be only as an Inn for him to whom it was formerly given for a possession.

B 2

† See *Origines Sacrae*, p. 35 to 45. That *St. Paul* himself probably preached here, and was the first Founder of a Christian Church in *Britain*.

Tacit.

Vit. Agric.

Tacit. vit.
Agric.

session. The *Romans* are called into the work, under whose Iron yoke, God had subdued all Nations, thereby more speedily to bring to pass his own conquest, both of that one Head, and all its Members. The first *Cæsar* had entred *Britain* before the Incarnation, and having seen and saluted it, and played his prize, returned with the fame only of Conquest of some few Lordships neighbouring to the *Belgick* shore; and so it continued correspondent to the *Romans*, or rather forgotten of them, till the time of *Claudius* the Emperor; who being at leisure to bethink him of the *Britons* Tribute, or rather aspiring to honour by a way formerly untrodden by his Ancestors, first settled Colonies in *Britain*, and brought it into the form of a Province, and engaged his Successors in a continual war to perfect that work, which outwearied their strength at last, and made them forego the prey, as too heavy for the Eagle to truss and carry away.

It oft befalls, that things of deformed shape are nevertheless of excellent spirit, and serve the turn best of all: and it is no less remarkable, that this tide of *Roman* invasion, however it represented to the world little other than a tumour of vain-glory in the *Romans*, that must needs be fatal to the *Britons* liberty and welfare: yet by over-ruling Providence it conduced so much to the *Britons* future glory, as it must be acknowledged one of the chief master-pieces of supernatural moderatorship that ever this poor Island met with. First, he taught them to bear the yoke, to stoop, and become tractable; for stubborn spirits must first stoop under power, before they will stoop to instruction. But this only in the way, for tractableness, if good ensue not, is of it self but a disposition for evil. Secondly, it brought into *Britain* the knowledge of Arts and Civility; and questionless it was a wise policy of *Agricola*, to go that way to work; for it is an easy and royal work to govern wise men, but to govern fools or madmen, is a continual slavery; and thus Religion already settled in *Britain*, became honoured with a train of Attendants and Hand-maids. Thirdly, they reduced the number of little Lordships nigher to the more honourable estate of Monarchy: for the *Romans*, by dear experience, finding no stability or assurance in what they had gotten, so long as so many petty Kings had the rule; they wisely brought the whole into one Province (because it is much easier to govern many subordinate each to other, than co-ordinate one with another) over which they allowed one chief, to rule the people according to their own Laws, saving their service to the *Romans* and their Lieutenants, until they were necessitated to yield up all to the next occupant. This served the *British* Church with a double interest. For first, Religion spreads sooner under one uniform Government, than under variety; and under Monarchy rightly ordered, rather than any other Government whatsoever; albeit that other Governments may afford it faster footing when it is entred. Secondly, *Rome* was a renowned Church throughout the world for gifts and graces; and it is obvious to conceive, that it was specially purposed by Divine Providence to make that place a Fountain, that from thence the knowledge of Christ might convey it self jointly with the influence of imperial power, as the Spirits with the Blood, into all Nations of that vast body.

Above one hundred years were spent in this provincial way of Government of *Britain*, under the *Roman* Lieutenants; during all which time, Religion spread under ground, while the *Roman* power in a continual war sprang upward. Nor is it strange that Religion should thrive in War: the *French* Wars in *Edward* the Third's time, brought much of this happiness to *England* from the *Waldenses*; and *Germany* had no less benefit by the wars of *Charles* the Fifth with the *Italians*, *French*

B R I T O N S.

French and Turks: and thus the *Romans* leavened with the Gospel, by exchanging men with *Britain*, and other mutual correspondences, insinuated that leaven by degrees, which in the conclusion prevailed over all.

For the Roman Lieutenants having gotten sure footing in *Britain*, steered their course with a different hand; generally they were of the Roman stamp, seeking to kill Christ in the Cradle; and by that means Religion met with many storms of bitter persecution, and so was compelled to bear a low sail: but some being more debonaire, and of wiser observation, soon found, that the way of justice and gentleness had more force in *Britain* than Arms, and so endeavoured to maintain that by moderation, which they had gotten by labour and blood; as it is ever seen that where conquest is in the van, gentleness follows in the rear, because no Bow can stand long bent, but at length must give in and grow weak. And thus by connivance, the *Britons* got a little more scope, and Religion more encouragement, till it became acquainted with the Roman Deputies, began to treat with the Emperors themselves, and under the wise government of *Aurelius* the Emperor mounting into the British Throne, crowned *Lucius** first of all Kings with the Royal Title of a Christian.

He now not so much a Vassal as a Friend and Ally to the *Romans*, and perceiving the Empire to be past noon, and their Lieutenants to comply with the Christians, began to provide for future Generations, and according to the two grand defects of Religion and Justice, applied himself for the establishment of both.

Religion in *Britain* hath hitherto been for the most part maintained by immediate influence from Heaven. No Schools, no Learning, either maintained or desired, the want whereof, together with the persecutions stirred up by the Emperors, especially *Domitian*, brought the Church to so low an ebb, that the Sacraments ceased: for Histories tell us that *Lucius*† sent to *Rome* for relief,

that the Bishop of that place (whether *Evaristus* or *Elutherius*) sent over Learned Men to Preach and Baptize both King and People; and in this, *Rome* might probably gain some Honour, although possibly the King intended it not, or much less to acknowledge any Authority or Power in that Church, over that of *Britain*.

This Act of *Lucius* so advanced him in the opinion of Writers, that they know not when they have said enough. Some will have him to be the instrument of the first entry of Religion into this Isle; others, that he settled a form of Church-government under the three Archbishops of *London*, *York* and *Caerlion* upon *Uske*, and 28 Bishopricks: the first of which is cried down by many demonstrative instances; nor can it consist with the second, nor that with it, or with the truth of other stories. For it neither can be made out that *Lucius* had that large circuit within his Dominion, nor that the title of Archbishop was in his days known; and 'tis very improbable that the British Church was so numerous, or that Religion in his time was overspread the whole Island; nor is there any mention in any Author of any Monuments of these Archbishops, or Bishops of *Britain*, for the space of 200 years after this King's reign, and yet no continual raging persecution (that we read of) that should enforce them to obscure their profession, or hide their heads; or if such times had been, it would have been expected that Bishops in those days should be in *Britain*, (as well as in other places) most famous for gifts and graces, and pass in the forefront of persecution. But we find no such thing; no not in the rages of *Dioclesian*, which made the

British

* See *Usher*
and *Stillingfleet*, &c. ut
infra.

† *Usher* de *Pri-*
mord. c. 3.
Stillingfleet,
Orig. p. 58 to
66. *Wilkins* L.
Sax. 201.

M. Westm.
an. 181.

M. Westm.
an. 303.

British Church famous for Martyrs: Writers speak of *Alban*, *Ampibalus*, *Aron*, *Julius* and a multitude of Lay-people, but do not mention one Bishop nor Presbyter, nor other Clergy-man, but *quendam Clericum*, a man it seems of no note, and of unknown name. In Charity therefore the English Church in those Days must be of mean repute for outward pomp; and not lifted up to that height of Archbishops, whenas *Rome* itself was content with a Bishop.

Somewhat more probable it is, that is noted by Writers concerning *Lucius* his endeavour to settle the Commonwealth and good Laws for Government, and to that end did write a Letter to *Eleutherius*, Bishop of *Rome*, for a Model of the *Roman* Laws; probably being induced thereunto by the splendor of the state of the *Roman* Church and Commonwealth; the only Favourite of fame in those times through the Northern parts of the World. Things afar off, I confess, are dim, and it is meet that Antiquaries should have the honour due to great after-sight: And therefore I might think (as some of them have done) that the Epistle of *Eleutherius* to King *Lucius* is spurious, if I could imagine to what end any man should hazard his wits upon such a Fiction, or if the Incongruities charged against it were incurable; but being allowed to be first written in Latin, and then translated into British for the people's satisfaction, and in that Language (the Original being lost) traduced to posterity; and then by some Latin Writer in after-ages returned into Latin, and so derived to these times (all which very probably hath been;) such occasions of exceptions might well arise by mistake
Cic. Antic. 2. of Translators and Transcribers in ignorant times, and the substance nevertheless remain entire and true. Considering therefore that the matter of that Epistle favoureth of the purer times of the Church, and so contrary to the dregs of *Romulus*, I mean, the policy, practice, and language of the *Roman* Clergy in these latter ages, wherein this forgery (if so it be) was made; I must allow it to pass for current for the substance, not justifying the syllabical writing thereof.

To others it seemeth needless and vain, that *Lucius* should send for a model to *Eleutherius**, whenas the *Roman* Deputies and Legions at home might have satisfied the King's desire in that particular, or their own experience might have taught them grounds sufficient, after two hundred years converse with the *Romans*, that they should have little needed a model for that which they saw continually before their view, or might have understood by inquiry of their own acquaintance. But what could be expected of rough Soldiers, concerning form of government of a Commonwealth? or if some exceeded the ordinary strain in policy, yet they were too wise to communicate such Pearls to conquered Nations, that ought to look no higher than the will of the Conqueror, and subsist in no better condition than may be controlled by the Supreme Imperial Law of the Lord *Paramount*; or if in this they had corresponded to the desires of the *Britons*, yet being for the most part ignorant of the main, they could never have satisfied the expectations of a Christian King, who desires such a Law as may befriend Religion, and wherein no Man was more like to give direction than *Eleutherius*, who seeing a kind of enmity between the *Roman* Laws and Christ's Kingdom, sends to the King a fair refusal of his request, upon this ground, that *Leges Romanas & Caesaris semper reprobare possumus*. He saw that they were not well grounded, he therefore refers the King to the sacred Scripture, that is Truth itself. Laws that come nighest to it are most constant, and make the Government more easy for the Magistrate, quiet for the People, and delightful to all; because

* Usher and
Stillingfleet,
at ante.

cause men's minds are settled in expectation of future events in Government, according to the present rule; and changes in course of Government, are looked at, as uncouth motions of the Celestial Bodies, portending Judgments or Dissolution. This was the way of human wisdom; but God had an eye on all this beyond all reach of pre-conceit of man, which was to make *England* happy in the enjoying of a better Law and Government than *Rome*, how glorious soever then it was; and to deliver that Island from the common danger of the World: for had we once come under the Law of the first Beast, as we were under his Power, we had been in danger of being born Slaves under the Law of the second Beast, as other Nations were, who cannot shake it off to this day.

But *Lucius* lived not to effect this work; it was much delayed by the evil of the times. Nothing was more changeable than the Empire grew; the Emperors many of them so vicious, as they were a burthen to Mankind: nor could they endure any Deputy or Lieutenant that were of better fame than themselves had. Some of them minded the affairs of the East, others of the North, none of them were *ad omnia*. And the Lieutenants in *Britain*, either too good for their Emperor, and so were soon removed; or too bad for the people of the Land, and never suffered to rest free from Tumults and Insurrections: So that neither *Lucius* could prevail, nor any of his Successors; but passing through continual cross floods of Persecutions under *Maximinus*, *Dioclesian*, and *Maximinianus*, and many Civil Broils, till the times of *Constantine* *, at length the Haven was attained.

* Stillingfl.
Orig. 73, 74.

For *Constantine* having overcome *Maxentius*, and gotten thereby into the highest Orb of Government in the Empire; reflected such an amiable aspect upon the Churches, especially in *Britain*, as if he had intended to pay to them all that God had lent him. A wise Prince he was questionless; yet towards the Church shewed more affection; endeavouring to reduce the Government in every place unto the *Roman* Prototype, and therein added much honour to that See, especially to Pope *Sylvester*, whose Scholar he had been. This may seem a sufficient inducement to persuade, that he was the first Patron of *English* Prelacy, seeing we find it in no approved testimony before that time, nor was it long after, whenas the presence of the *British* Bishops are found at the Synod by him called at * *Arles*, viz. the Bishops (not Archbishops) of *London* and *York*, and the Bishop of *Maldune*, and those in no great pomp, if the relation be true, that by reason of their poverty they were not able to undergo the charge of their Journey and Attendance; so as it seems they had but new set up, and had not yet found out the right way of Trade that other Bishops had attained. And thus God ordered first the settling of a Government of the Church in *Britain*, and its Liberties, before the Secular part enjoyed any; therein working with this Nation, as with a man, making him to be *bonus homo* before he can be *bonus civis*.

Concil. Brit.
42.
* Stillingfl.
Orig. 75, &c.

The Church of *Britain* thus set together, is wound up for motion; they soon learned the use of Synods from that Synod at *Arles*, if they had it not before: and took as much power to themselves in their Synods as in other Countries were used, and somewhat more to boot. For they had the hap to continue in *Britain* in free course, a full century of years, before the Civil Magistrate had any other power, but what was wrapped up under the allowance of their *Roman* Masters; who, like *Gallio*, looked upon the Church-affairs as out of their Sphere, and therefore cared for none of those things; or if the zeal of any so far prevailed, it was much

in

in favour of the Bishops, upon whom the Emperors began to dote as Oracles; and this raised the price of the Clergy, and taught them the way to fish for themselves. No wonder it is therefore if Synods in *Britain*, or rather the Clergy in the Synods, (which probably were then the representative Body of the Nation) swayed all that was free from the *Roman* Magistracy, and in some things out-reached their Limits, especially during the interim wherein the *Romans* held the Arms of civil Magistracy bound, and let the Clergy have their scope, that soon began to be ambient, and conceit a new Idea of deportment, like that of the second Beast in its Infancy. Nor did the *Britons* espy their danger herein, for they had been used to idolize their Druids, and it was no more but facing about to do as much for their Bishops.

Of this power of Synods I shall propound but three Precedents, and so draw to a Conclusion of what I think meet to note concerning the *British* affairs. I suppose it will not be doubted but that publick Consultations concerning the publick Government of any Place or Nation, ought not to be called but by the Supreme Power; and that such Consultations are to be directed by that Supreme Power.

M. Westm.
An. 446. Beda.
Lib. 1. c. 17.

The *Britons* had a King, and yet without his consent they call a Synod against the *Pelagian* Heresy, and chuse a Moderator from beyond the Sea, and by that Synod not only overwhelmed the Heresy, but excommunicated their King. This was a National Synod, and might well stand with the rule of State, which then had

* Ante, p. 2.

seated the Supreme Power in the People, as I formerly noted out of *Dion* *. But it could be no warrant for that which followed, viz. that a Country Synod should excommunicate a King, as it befel in the cases of *Moris* and *Morcant*: or that such

Concil. Brit.
p. 49, 62, 382.
Concil. Brit.
385.

a Synod should intermeddle in matters of *Meum* and *Tuum*, as in the case of *Lou-mack*, who having invaded the patrimony of the Church, the Bishop of *Landaff*, in a Synod of his Clergy, enjoined him Penance. And the like befel unto *Brockvaile*, who was compelled by the Synod to make amends to *Civilack*, Bishop of *Landaff*, for injury to him done: Which I note not by way of imputation; for this exorbitancy (if so it were) might correspond with these Times, wherein very probable it is, that Justice could not be had elsewhere. And had the Clergy been as careful of Holiness, as in the former cases they seem jealous for Justice, *Britain* must have had the repute of a *Nation of Priests* and Holy men, rather than of *Tyrants*; whereas it was become a glut of wickedness, and a burden that God would endure no longer: Which rendereth their Synods liable to Exception, as being such as were either lifted up or drawn aside; and as the Lift to the Cloth, sheweth that the Nation stood in need of that instruction, which with a strong hand God wrought into them by the sad Calamity which ensueth.

Gildas.

C H A P. IV.

Of the Entry of the Saxons, and their Manner of Government.

WASTED with time, and wounded by eternal doom, the glory of the Western Empire going down apace, now draweth nigh unto its everlasting night; and that vast body (not able longer to subsist, but dying by degrees) abandons this Isle of *Britain* its utmost limit, and last inliven-

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ed, to subsist alone miserably, or else to die. The choice was more difficult by how much the more *England** was much wasted in the *Roman Wars*, the flower of their strength spent in foreign service, the remainder but few, and these exceeding vicious; and, which was worst of all, engaged by the *Romans* in a War with the *Picts*, against whom the *Romans* themselves found it too burdensome for them to hold out, without the help of a Wall; and albeit that the very name of an old Servant of four hundred years continuance, might have moved a *Roman* heart to commiseration, yet their spirits fail, and forsaken *England** must now go into the wilderness, and, naked as they are, endure the brunt of the cold storms of the Northern *Picts*, without any shelter but the hidden will of God then frowning upon them. In this condition, they, half desperate, seek for a cure in reason worse than the disease. For it had been better for them to have stooped to hard conditions with the *Picts*, considering they were all but one people, and differing only by the breadth of a wall, than to call in a new people whose qualities they were ignorant of; and at the best to make them their companions, who might prove (as they afterwards did) both Lords and Masters over them. But there is no reason against God's will. The *Britons* needed present help, they, overlaid by invasions from the *Picts* (who soon espied the *Romans* gone, and their own advantage) sent for aid where they were most like to speed for the present, and left the future to look to itself. *Ireland* was nigh, but we find nothing concerning their interest in shipping; the *French Coasts* were not their own men, being yet within the *Roman Line*: and none were at liberty, but such as were never subdued by the *Romans*; only the *Saxons* are in the thoughts of the *Britons*, a mighty people not far off, able to mate the *Romans* in their chiefeft pride; and though in a manner Borderers upon the *Roman* world, yet unsubdued by them, used to the Wars, mighty at Sea, and now given over by the *Romans* in a plain field, were at leisure, and so well knew the way to *Britain*, that the *Romans* intituled the Coasts of *Norfolk* and *Suffolk* the *Saxons Coasts*, from the many visits that the *Saxons* had already made into those parts, full sore against the *Romans* wills.

Britain.

Britain.

Amian. l. 16.

Zosimus hist. lib. 3.

Amian. l. 28. 30.

I hold it both needless and fruitless to enter into the Lists, concerning the original of the *Saxons*; whether they were Natives from the Northern parts of *Germany*, or the Reliques of the *Macedonian Army* under *Alexander*. But it seems their Government about the time of *Tiberius* was in the general so suitable to the *Grecians*, as if not by the Reliques of *Alexander's Army* (which is generally agreed, emptied itself into the North) yet by the Neighbourhood of *Greece* unto these Nations, it cannot be imagined, but much of the *Grecian Wisdom* was derived into those parts, long before the *Romans* glory was mounted up to the full pitch; and because this wisdom could never be thus imported, but in vessels of man's flesh, rigged according to the *Grecian* guise, it may be well supposed, that there is some consanguinity between the *Saxons* and the *Grecians*, although the degrees be not known. The people were a free people, governed by Laws, and those made not after the manner of the *Gauls* (as *Caesar* noteth) by the great men, but by the people; and therefore called a free people, because they are a Law to themselves; and this was a privilege belonging to all the *Germans*, as *Tacitus* observeth, in cases of most publick consequence, *de majoribus omnes*; like unto the manner both of the *Athenians* and *Lacedemonians* in their *Concio*. For which cause also I take the *Gauls* to be strangers in Blood unto the *Britons*, however nigh they were in habitation. That some matters of action (especially concerning the publick safety)

Suffrid. Petrus Hist. antiquit. lib. 3. cap. 1.

Cæf. Com.

Histor. Germ. Plutarch. vit. Solon. & Lycurg.

Albinus Sax.

72.

Xenophon.

Tacit.

Emius.

Avent. Annal.

Boior. 1. 10.

Beuter. in

Tac. 125.

Amian.

safety) were by that general vote concluded and ordered, seems probably by their manner of meeting with their weapons. But such matters as were of less concernment, the Council of Lords determined *de minoribus Principes*, saith the same Author. Their Country they divided into Counties or Circuits all under the government of twelve Lords, like the *Athenian* territory under the *Archontes*. These (with the other Princes) had the judicial power of distributive justice committed to them, together with one hundred of the Commons out of each division. The Election of these Princes with their Commission, was concluded *inter majora* by the general Assembly, and they executed their Commission in Circuits, like unto the *Athenian* *Heliastick* or Subdiel Court, which was rural, and for the most part kept in the open air. In brief, their judicial proceedings were very suitable to the *Athenian*, but their military more like the *Lacedemonian*, whom above all others in their manners they most resembled. In their Religion they were very devout, saving that they much rested in the reverence they bare to their Priests, whom they made the Moderator of their general Assembly, their Judge, Advocate, and Executioner in Martial Law; therein submitting to them as unto God's instrument. They worship an invisible and an infinite Deity; man's flesh is their Sacrifice of highest account: and as often as they make inquiry by lots, they do it with that solemn reverence as may put all the Christian world to the blush, *precatus Deos, cælumque suspiciens*; and this done by the Priests of the Town, if it be in publick causes, or otherwise if private, then by the master of the Family; so as they had Family-worship as well as publick. These things I note, that it may appear how nigh these invited guests resemble the old Religion of the *Britons*, and how probable it is, that this Island hath from time to time been no other than as a Sewer to empty the superfluity of the *German* Nations, and how the influence of these old principles doth work in the fundamental government of this Kingdom, to this present day. These are the instruments chosen by God, and called by the *Britons* to be their deliverers from their Enemies, which they did indeed; yet not swayed thereto by love of Justice or Compassion, (for if writers say true, they were no better than highway-men both by Sea and Land) but by their love of spoil and prey, and by the displeasure of God against a dissolute people. They profess friendship nevertheless in their first entrance; but espying the weakness of the *Britons*, and feeling the strength of the *Picts*, and finding the Land large and good, they soon pick'd quarrels with their Hosts, made peace with the *Picts*, and of feigned Friends, becoming unfeigned Foes to the *Britons*, scattered a poor remnant of Christians, some to the furthest corners of the Kingdom, others into foreign Nations, like so many Seedsmen, to sow the precious Seed of Life in a savage soil. And those few that remained behind, profiting under much misery, by their doctrine and good example yielded better blessings unto their new-come guests than they either expected or desired. And thus the miseries of poor *Britain*, became riches of mercy to the Northern and Eastern people; and the ruins here, the foundations of many famous Churches elsewhere. Nor yet was mercy from the *Britons* utterly taken away, nor their blood drawn out to the last drop, or their name quite blotted out of the book of fame: for whereas two things make men miserable, *viz.* the heaviness of the burden without, and the failing of the heart within, and God's ordinary way of redress of the former beginneth in taking away the latter; thus dealt he with the *Britons*. For in danger, as want of strength breeds fear, and that (by extremity) despair, so despair oftentimes revives into a kind of rage that puts

put strength forth beyond reason; I say beyond reason, for cause cannot be given thereof, other than God's extraordinary dispensation in a judiciary way, when he seeth the stronger to wax insolent over the weaker. Thus the *Britons* fled from the *Picts* so long as they had any hope of relief from the *Saxons*; but being become their Enemies, and pursuing them to the low-water mark, that in all reason they must either drink or bleed their last; then their courage revived, and by divers Victories, by the space of 200 years, God stopped the hasty Conquest of the *Saxons*. The result whereof, by truces, leagues, commerce, conversation, and marriages * between these two Nations, declared plainly that it was too late for the *Saxons* to get all; their bounds being predetermined by God, and thus declared to the world. In all which, God (taming the *Britons* pride by the *Saxons* power, and discovering the *Saxons* darkness by the *Britons* light) made himself Lord over both people in the conclusion.

Willms LL.
Sax. 125, and
206.

C H A P. V.

Of Austin's coming to the Saxons in England. His Entertainment and Work †.

† See Dugd.
Monast. vol. 1.
p. 5, to 27.

DURING these troublesome times, came a third party that wrought more trouble to this Isle than either *Pict* or *Saxon*, for it troubled all. This was the Canonical Power of the *Roman* Bishop, now called the Universal Bishop. For the *Roman* Emperor having removed the Imperial residence to *Constantinople*, weakened the Western part of the Empire; and exposed it not only to the foreign invasions of the *Goths*, *Vandals*, *Herules*, *Lombards*, and other flocks of people, that about these times by secret instinct were weary of their own dwellings; but also to the rising power of the Bishop of *Rome* and (as it were) purposely for his advancement. Who by patience out-rode the storms of foreign force, and took advantage of those publick calamitous times to insinuate deeper into the Consciences of distressed people, that knew no other consolation in a plundered estate, but from God and the Bishop, who was the chief in account amongst them. The power of the Bishop of *Rome* thus growing in the West, made him to out-reach not only his own Diocese and Province, but to mind a kind of Ecclesiastical Empire, and a title according thereunto; which at length he attained from an Emperor fitted for his turn; and that was enough to make him pass for current in the Empire. But *Britain* was forsaken by the *Roman* Empire above 153 years before: So as, tho' the Emperor could prefer his Chaplains Power or Honour as far as his own, which was to the *French* shore; yet *Britain* was in another world under the *Saxons* power, and not worth looking after till the plundering was over, and the *Saxon* affairs settled; so as some fat may be had. Then an instrument is sought after for the work, and none is found so far fit to wind the *Saxon* up to the *Roman* bent as a Monk, that was an holy humble man in the opinion of all, but of those that were so in truth, and knew him. This is *Austin*, sent by Pope *Gregory* to do a work that would not be publickly owned. It was pretended to bring Religion to the *Saxons* in *England*; therefore they gave him the title

Naucler. 505.

C 2

* Note, King *Ina* was by Blood a *Briton* as well as *Saxon*; and many of his Laws tend to the Union and Government of both People. See LL. *Ina*, c. 22, 31, 32, 47, &c. This *Ina* is supposed to have been the Son of Queen *Sexburg*, (the Sister of *Penda*, King of *Merca*) begot by *Cadwallan* the *British* King, and born after her Divorce from *Kinigils* the *West-Saxon*: So that *Ina* united the Royal Bloods of *Britons* and *Saxons* in his own Person.

title of the Saxon Apostle; but to be plain, it was to bring in a Church-policy, with a kind of worship that rendred the *Latria* to God, and the *Dulia* to Rome. The Saxons were not wholly destitute of Religion, and that, Gregory himself in his Letter to *Brunchilda*, the French Queen, confesseth; *Indicamus*, saith he, *ad nos pervenisse Ecclesiam Anglicanam velle fieri Christianam*; so as there was a good disposition to Religion before ever *Austin* came, and such an one as rang loud to Rome. But far more evident is it from the Saxons keeping of Easter more *Asiatico*, which custom also continued after *Austin's* coming fifty years, sore against *Austin's* will. The dispute between *Coleman* and *Wilfride* bears witness to that; and it had been a miraculous ignorance or hardness, had the Saxons, a people ordained for mercy (as the sequel shewed) conversed with the Christian *Britons* and *Picts* above 150 years, without any touch of their Religion. If we then take *Austin* in his best colour, he might be said to bring Religion to the *South-Saxons*, after the Roman garb; and his hottest disputes about *Easter*, *Tonsure*, the Roman Supremacy, and his own *Legatine* power, and his worthy *Queries* to the Pope, shew he regarded more the fashion than the thing; and the fashion of his Person, more than the work he pretended; for he loved state, and to be somewhat like to the Legate of an Universal Bishop; and therefore of a Monk he suddenly becomes a Bishop in *Germany*, before ever he had a Diocese, or saw *England*; and after he perceived that his work was like to thrive, he returned, and was made Archbishop of the Saxons, before any other Bishops were amongst them; and after three years had the Pall, with title of Supremacy over the British Bishops, who never submitted to him.

His advantages were, first his entrance upon *Kent*, the furthest corner of all the Island from the *Britons* and *Picts*, and so less prejudiced by their Church-policy; and at that very time interested in the Roman air above all the other Saxons: for their King had married a Daughter of *France*, one that was a pupil to Rome, and a devout woman; she first brought *Austin* into acceptance with the King, who also at that present held the chief power of all the Saxon Kings in this Isle, which was now of great efficacy in this work: for where Religion and Power flow from one spring to one stream, it is hard to chuse the one, and refuse the other. And thus Rome may thank *France* for the first earnest they had of all the riches of *England*, and we for the first entrance of all our ensuing bondage and misery. *Austin* had also a gift or trick of working miracles, whether more suitable to the working of Satan, or of God, I cannot define. It seems they walked only in the dark; for either the *Britons* saw through them, or saw them not; nor could *Austin* with his miracles or finesse settle one footstep of his Church-policy amongst them; happily they remembering the Roman Dragon, liked the worse of the Roman Woman; and the rather because the Carriage of their Messenger was as full of the Archbishop, as it was empty of the Christian. I would not touch upon particular passages of action, but that it is so remarkable, that *Austin* himself, but a Novice in comparison of the British Bishops (the clearest lights that the Northern parts of the World then had, and unto whom the right hand of fellowship was due by the Roman Canon) should nevertheless shew no more respect to them at their first solemn entrance into his presence than to Vassals, as I could not but note the same, as a strong argument that this whole work *ab initio*, was but a vapour of Prelacy. This the British Bishops soon espied, and shaped him an answer suitable to his message, the substance whereof was afterward sent him in writing by the Abbot of *Banger*, and of late published by Sir *Henry Spelman*, as followeth:

Be

BE it known (and without doubt) unto you, that we all*, and every one of us, are obedient and subject to the Church of God, and to the Pope of Rome, and to every godly Christian, to love every one in his degree, in perfect Charity, and to help every one of them, by word and deed to be Children of God: And other obedience than this I do not know to be due to him whom you name to be Pope; nor [ought] by the Father of Fathers to be claimed or demanded. And this obedience we are ready to give and pay to him, and to every Christian continually. Besides we are under the government of the Bishop of Caerleon upon Uske, who is to oversee under God over us, and cause us to keep the way spiritual.

This was the Britons resolution, and they were as good as their word; for they maintained the liberty of their Church five hundred years after this time; and were the last of all the Churches of Europe that gave their power to the Roman Beast; and in the person of Henry the Eighth, that came of that blood by Teuther, the first that took away that power again. Austin having met with this affront, and perceiving that the Britons were stronger in their Faith than he by his Miracles, cast about to try the Saxons courtesy; that what the Ephod could not, the Sword wrapt up therein should. I say not that he procured, but he threatned or * prophesied the destruction of the Monks of Bangor; and it came to pass, and the Occasion is by Writers loudly suspected. Nevertheless the Saxons were not soport. zealous of their new Religion, as to make a new National quarrel between the Britons and themselves, but left the game to be played out by Austin; who finding by experience that it would not prove the work of one man, left it to successors to work out by degrees in efflux of time. And thus Austin, neither good Servant to the Servant of Servants, nor good Monk, retires to settle his Saxon province, and to present, or rather to prostitute it to the lust of that red Prostitute; which was the general piety of those ignorant times.

* See Stillingfl.
Orig. p. 357.
358, &c.

Both words
were then of
the same im-
port.

Bed. Hist.
lib. 2. cap. 2.
Concil. Brit.
fol. 111.

C H A P. VI.

Of the Imbodying of Prelacy into the Government of this Kingdom.

I Cannot think that the platform of the mystery of iniquity (when boiled to the height) was ever fore-seen, or in the aim of the wicked spirits on Earth, or those in Hell. Yet were they all instruments of this monstrous birth, filled with subtilty and mischief, guided principally by occasion, and over-ruled by the Justice and Wisdom of God, to make a yoke for Monarchs, and a scourge to the world for their refusal of the government of Christ, until this monster came to perfection; and wherein themselves were feloes de se, and wrought their own mischief. For Austin coming in as a third Proprietor with King and People, and having gathered the materials of a Church, reason told them that a form of government must be settled in that Church. The Saxons had no principles of their own (for they had no learning) and to go to the Britons for a pattern might be

ig-

Tacit. Hist.
Germ.

over-rule

Greg. Epist.
ad Eulog.

ignoble; and where the choice is small, it is soon made. *Rome* held now the most part of the Churches of *Europe* at School; the *Saxons* soon resolve, *Rome* that had been their Mother, shall be also their Father: and thus at one draught they drank up a Potion of the whole Hierarchy of *Rome* from the Pope to the Apparator, with a *quicquid imponitur & imponetur*, which was of such lasting efficacy, that it ceaseth not to work even to this day, although it was slow in the first *Provocation*. For the *Saxons* had a Commonwealth founded in the Liberty of the People; and it was a master-piece for *Austin* and the Clergy, so to work, as to remain members of this Commonwealth, and yet retain their hearts for *Rome*, which was now grown almost to the pitch of that Antichrist. For reason must needs tell them, that the *Saxon* principles would not suffer them to be *ad omnia* for *Rome*, nor the *Roman* Canon allow them to be wholly *Saxon*; and they saw plainly that the times were too tender to endure them to be declarative on either part; and therefore they chose a third way, which was to preserve the municipal Laws in moderation towards the Canon, and to that end to endeavour such a temper upon the State as must admit them to be in repute, such as without whom the Commonwealth could not well subsist, no more than a body without a soul; and that few occasions should befall, but (at least *in ordine remoto*) must reflect upon both, and then all reason will bespeak them to join in the legislative power and government of this Kingdom; but especially as Bishops, who are now *Magna spes altera Romæ*, and the very top-flowers of wisdom and learning. And unto this temper the *Saxons* were sufficiently prepared and inclinable; for it was no new thing for them to admit their Heathenish Priests into their general meetings, and allow them much power therein; and then it is but the person changed, and they must do as much for their Bishops, now they are become Christian; especially themselves being all for the field, and overgrown with a general ignorance, the common disease of those times. Kings were in no better condition: it was hard for them to be Baptized, and not to be Baptized into *Rome*, and commonly under such a Covenant as though many might repent of, yet none durst amend: For whenas the Pope is Lord of the Consciences of the People, the King's power may sometimes out-face, but can never govern*: the *Saxon* Kings were therefore fain to make a virtue of necessity, and advance Bishops to be common favourites both of *Rome* and themselves, to maintain good correspondency between both Swords; and to countenance the power of the temporal Magistrate in cases of dispute, else he oftentimes might command, and yet go without. Thus entered the Prelates upon affairs of Kings and Kingdoms, and became lovers of Lordships, and troublers of States; and if in any thing they served their Country, they served *Rome* much more; their merchandise was made of the Policies and Councils of all Kingdoms and States, and such returns proceeded as were still subservient to the *Roman* interest; and they intoxicated the domestick counsels in such manner as they generally staggered, and many times came short of home. Nevertheless, at the first this was but rare, clancular, and covered with much modesty; for (excepting such choice spirits as *Austin* had) *Roman* Prelacy in these younger times was but Velvet-headed, and endured not much greatness or big titles, but spake like a Lamb; *Ego non verbis quæro prosperari, sed moribus*, said this Gregory to the *Alexandrian* Bishop, who had put upon him the title of Universal Bishop or Pope; and whereas he had in a way of Courtship called Gregory's Counsels Commands, he startles at it; *quod verbum jussionis*, saith he, *peto a meo auditu removeri, quia scio quis sum & qui estis*. Thus Prelacy first conveyed itself into

into opinion, afterwards into conscience; and ambition coming in the rear, made it become both Bishop and Lord*.

C H A P. VII.

Of Metropolitans in the Saxons time.

BEING in pursuit of the Government of this Kingdom in elder times, and therein first of the Persons with their relation, then of their Work, and lastly of their Courts and Laws, and now in hand with the Ecclesiastical Persons; I shall descend to their particular ranks or degrees, and shall shew what they were in their original, and what overplus they had by Laws. And first concerning the Metropolitan. In his original, his Office was to visit the Bishops, admonish and exhort them, and in full Synod to correct such disorders as the Bishop could not reform, and in all things to proceed according to the prescript Canon.

Thus witnesseth *Boniface*, an Archbishop to an Archbishop of an Archbishop; Concil. Brit. not according to the practice of the times wherein it was written, but according to the antient rule. For long before *Boniface* his time Archbishops were sworn beyond the girt of the Canon; and before that *England* was honoured with that rank of men, Metropolitans were become Metronomians, and above all rule, but that of their own will, and through common custom had no regard to any other; so as if *England* will have them, it must be content to have them with their faults. But the truth is, the dignity, or title (which you will) was a plant of that virulent nature that would scarce keep under-ground in the time of the hottest persecution: *Mag. cents 36.* For *Stephen*, Bishop of *Rome*, liked the title of Universal Bishop. And after a little peace, it's a wonder how it grew to that height that it had; and no less wonderful that the *Saxons* gave entertainment to such Potentates. Much of whose spirits they might have observed in the entrance of their first Archbishop *Austin*, if God had not given them over to thralldom under that mystery of iniquity (of *sinful man aspiring into the place of God*, taught by that courtly messenger of *Rome*) because they would not stoop to that mystery of godliness, God manifested in the flesh, as it was taught in simplicity by the rural *Picts* and *Britons*. But this was not all, for because Archbishops were gotten above Canon, which was thought scandalous; therefore they gave as large a power by Canon as the former usurpation amounted unto, and stretched the Canon to the mind of the man, whenas they should have rather reduced the man to the Canon. The words of the Canon in our English tongue, run thus: *It belongs to the Metropolitan Bishop to rule God's Churches; to govern, chuse, appoint, confirm, and remove Abbots, Abbesses, Presbyters, and Deacons; and herewith the King hath nothing to do.* And thus, though the apparent power of Archbishops was great and unlimited, yet what more was wrapped up in that word *Churches*, only time must declare; for it is very likely that in those days it was not understood: yet the practice doth not obscurely declare the matter, for before this Law was established by *Witbered* in a Council (wherein *Bertnaldus* Archbishop of *Canterbury* was president, and who was first Primate of *England*). *Theodore* Archbishop of *Canterbury* used such power over other Bishops in ordaining or removing them, as a Writer saith, that his rule was no other than *perturbatio* and *impetus animi*; *Concil. Brit. p. 190.* *Ant. Brit. p. 55.* *post. p. 125.*

* See *Stillingsf. Orig. 363.* where the words of *Gildas* are cited, viz. *That the Clergy are more ambitious of Degrees in the Church, than they are of the Kingdom of Heaven.*

and

Malmsh. lib. 1.
cap. 2.
Ant. Brit.
p. 54.

and his carriage towards *Wilfrid* is produced as a Testimony. But the Metropolitan in *England*, as the times then were, had yet a further advantage, even over Kings themselves; for there were divers Kingdoms in this Island, and Kings had no further power than their limits afforded them: But there was but one Metropolitan for a long time in all the *Saxon* Territories, so as his power was in spirituals over many Kingdoms, and so he became indeed *Alterius orbis Papa*. And it was a remarkable testimony of God's special providence, that the spirits of these petty Popes should be so bound up under the notion of the Infallibility of the *Roman* Chair, that they had not torn the *European* Church into as many Popedoms as Provinces. But no doubt God ordered it for a Scourge to the World, that Antichrist should be but one, that he might be the more absolute Tyrant; and that Kings should bow down their necks under the double or rather multiple yoke of Pope and Archbishops, for their Rebellion against the King of Kings.

C H A P. VIII.

Of the Saxon Bishops.

Ant. Brit. 52.
Concil. Brit.
133.
Ant. Brit. 54.
Ibid. 53.

HAD not Bishops been somewhat sutable, the *Roman* Clergy had not been like itself; and it had been contrary to *Austin's* principles to have advanced to Bishopricks men better qualified than himself. They first ruled the *Saxon* Church jointly in the nature of a Presbytery, till about sixty years after *Austin's* time, their pride would not endure together any longer, and it may be grew somewhat untractable under the Metropolitan, that resolved to be prouder than all; and thereupon *Theodore* Archbishop of *Canterbury* first divided his Province into Five Diocesses, and by appointment of the Kings and People placed Bishops over each, every one of them being of the right *Roman* stamp, as himself was of the right *Roman* shaven. And it had been a wonder if Episcopacy (now for the space of Three hundred years degenerated, and that into such a monstrous shape as a Pope) should by transplanting become regenerate into their original condition of meekness and humility. But it is a much greater wonder that they should become so purely ambitious as not to endure a thought of the ways of sobriety, but would be proud by Law; to let all the world know that they held it no infirmity, but an honour. For albeit that in the first time the Bishop's work was to instruct and teach, to see the service of God to be diligently and purely administred in publick Congregations, to Exhort, Reprove, and by teaching to mend such matters as he should find in Life and Doctrine contrary to Religion; and accordingly they carried themselves meekly and humbly, studying peace and truth, and meddled not with Secular Affairs: they are now grown up into State, and must now ride on horse-back, that were wont to go on foot Preaching the Word; and must be respected above the rank of ordinary Presbytery; none must doubt of their truth, nor question their words, but they must be holden *Sacred*, as the word of a King, *sine juramento sit irrefragabile*. Their presence must be a Sanctuary against all violence; all Clerks and Religious houses must stoop under their power; their sentence must be definitive: and thus advanced, they must keep state, viz. not go too far to meet Princes in their approach towards them, nor to light off their Horses backs to do Princes Reverence at their meeting; because they are equal to Princes and Emperors: and if any Bishop shall behave himself otherwise, and after the old rustical fashion (for such are the

Concil. Brit.
161, 238, 246,
261.

Mag. Cent. 7.
cap. 7.

Bed. Hist. 1. 4.
cap. 3.

Concil. Brit.
196.
An. 697.

Ibid. 329.
An. 816.

Conc. 8. gen.
Constant. can.

words of the Canon) for disgrace done to their Dignity they must be suspended: So as by their own confession, Bishops henceforth are Bishops of a *new fashion*, that must incur a note of infamy for shewing any gesture of humility to Princes, which if any man will see more fully, let him peruse the Canon if he please. But this is not sublime enough; they must be not only equal, but in many respects superiour to Princes: for in matters that concern God, *Omnibus dignitatibus præsunt*; and more plainly, Princes must obey them *Ex corde cum magna humilitate*; and this was allowed of by *Offa* the great in a *legatine* Synod. And thus highly advanced, ^{Mag. cent. 8. cap. 9.} Bishops are now *consecrated* to any work, and make every thing *Sacred*. Oaths taken before them are of highest moment; and therefore the trial of Crimes before them, and the acknowledgment of Deeds of conveyance in their presence, are without controul. Their custody is a sufficient Seal to all weights and measures, which they committed to some Clerk whom they trusted: and who at this day (though a Lay-person) beareth title of *Clerk* of the Market. And although anciently they might not *interesse secularibus*; yet afterwards it became a part of their office to assist Judges in secular causes, to see that justice be not wronged; and they had the sole cognizance of all causes criminal belonging to the *Clergy*, their Tenants or Servants; and in their Synods their power reached to such Crimes of Lay-men as came within the favour of the Canon, though it were but in the cold scent, as the Laws of *Atbelstane* and other his successors sufficiently set forth. And thus dressed up, let them stand aside, that room may be made for their Train.

Concil. Brit.

128. or 182.

An. 693.

Ll. Sax. An.

928. cap. 37.

Ll. Æthelst.

cap. 11.

Concil. Brit.

p. 197.

An. 697.

C H A P. IX.

Of the Saxon Presbyters.

THESE follow their Lords the Bishops as fast as they can hunt; for being of the same Order (as the less proud times acknowledged) they would not be under foot, and the others above the top. True it is, that the Bishops loaded them with Canons, and kept them under by hard work, under the trick of Canonical obedience; yet it was no part of their meaning to suffer them to become vile in the eyes of the Laity, for they knew well enough that the Presbyters must be their bridles to lead and curb the people, and their eyes to see whether the winds from below blew fair or foul for them; whose consciences already told them that they merited not much favour from the people. They see it therefore necessary to increase the price of a Presbyter somewhat within the alloy of a Bishop, to the end that the Presbytery may not be too like the *Babylonian* Image, whose Head was Gold, and Feet of Iron and Clay. A Presbyter therefore they will have to be of equal Repute with a Baron; and his person shall be in Repute so *Sacred*, as that all wrong done thereunto must be doubly punished, with satisfaction to the party, and to the Church. His Credit or Fame must not be touched by *Lay*-testimony: Nor is he to be judged by any Secular Power; but to be honoured as an Angel. Such are these instruments of the Bishops Government; and these are put as a glass between the Bishops and People, and could represent the People to the Bishop black or white, and the Bishop to them in like manner, as they pleased; and so under * fear of the Bishops curse, kept the People in awe to themselves and it.

Concil. Brit.

p. 576.

Concil. Brit.

p. 448.

Ll. Æthelst.

13. Ibid. 4c6.

Concil. Brit.

p. 273.

Ll. Æthelst. c. 2.

Ll. Canut.

c. 12.

Mag. cent. 8.

cap. 9.

* i. e. Threats.

C H A P. X.

Of other inferiour Church-Officers amongst the Saxons.

THEY had other inferiour degrees of the Clergy, which because they are merely subservient, and not considerable in Church-government, I shall only touch upon them. The first are called *Deacons*, which were attending upon the Presbyters to bring the offerings to the Altar, to read the Gospel, to Baptize, and Administer the Lord's Supper. Then follow the *Sub-deacons*, who used to attend the Deacons with consecrated Vessels, and other necessaries for the Administring of the Sacraments. Next these *Acolites*, which waited with the Tapers ready lighted while the Gospel was read, and the Sacrament consecrated. Then *Exorcists*, that served to dispossess such as were possessed by the Devil; an office (as it may seem) of little use, yet very ancient; for they are found at the Synod at *Arles*, which was within Three hundred years after Christ's death. *Lecturers* came next, who served to read and expound; and these were of use when Churches began to multiply, and *Presbyters* grew idle. Lastly, *Ostiaries*; which used to ring the bells, and open and shut the Church-doors.

Deacons.

Sub-deacons.

Acolites.

Exorcists.

Concil. Brit.
p. 54.
Lecturers.

Ostiaries.

Concil. Brit.
261.
An. 750.

These are the several ranks of Church-Officers, being Seven in number, (for Bishops and *Presbyters* make but one) and might be (as thus ordered) the Seven heads of the Beast whereon the Woman sitteth; and with much ado make up a kind of Church-service, somewhat like a great *Hoe* in a ship-yard at the stirring of a little log, and are nevertheless well paid for their labour.

C H A P. XI.

Of Church-mens Maintenance amongst the Saxons.

I Take no notice in this account of the *Abbots* and *Priors*, and other such Religious men, as they were then called; nor can I pass them amongst the number of Church-governors or Officers, being no other than as a sixth finger, or an excrescence that the body might well spare, and yet they sucked up much of the blood and spirits thereof. But as touching the maintenance of those formerly mentioned, who had a constant influence in the Government of the affairs of the public worship of God, and regard of the salvation of the Souls of the people; I say their maintenance was diversly raised, and as diversly imployed. First, through the bounty of Kings and great men, Lands and Mannors were bestowed upon the Metropolitan and Bishops, in * free Alms; and from these arose the maintenance that ascended up in abundance to the higher Region of the Clergy, but came again in thin dews scarce enough to keep the Husbandman's hope from despair; otherwise had not the Prelates so soon mounted up into the chair of Pomp and State, as they did. I say, these are given in free Alms, or more plainly, as Alms free from all service; and this was doubtless soon thought upon, for it was formerly in precedent with their Heathenish Priests and Druids, as * *Cæsar* noteth, that they had *omnium rerum immunitatem*: yet with the exception of works of publick charity and safety,

* Frank-
almoigne.* Cæf. Com.
li. 6.

safety, such as are maintaining of High-ways, repairing of Bridges, and fortifying of Castles, &c. and hereof the precedents are numerous. The work whereto this wages was appointed, was the worship of God, and increase of Religion; and thus not only many of the King's Subjects were exempted from public service, but much of the Revenue of the Kingdom formerly imployed for the publick safety, became acquitted from the service of the *Field*, to the service of the *Bead*; the strength of the Kingdom much impaired, and the Subjects much grieved; who in those early times saw the inconveniences, and complained thereof to their Kings, but could not prevail. This was the vintage of Kings and great men, but the gleanings of the people were much more plentiful; for besides the Courts (which swelled as the irregularities of those times increased, and thereby enriched the Confessors of that covetous Generation, the greatest part whereof ought by the Canon to go to the publick) the best part of the settled maintenance, especially of the inferior degrees, arose from the good affections of the people, who were either forward to offer, or easily perswaded to forgo a constant supply for the Church-men out of their Estates, as well real as personal, especially in the particulars ensuing. The most ancient of all the rest was the first-fruits, which was by way of eminency called *Cyrick-sceate*, or in more plain *English*, *Church-Fee*; which was always payable upon St. *Martin's* day unto the Bishop out of that house where the party did inhabit upon the Day or Feast of the Nativity. It was first granted by Parliament in the time of King *Ina*; and in case of neglect of payment, or denial, it was penal twelve-fold to the Bishop, besides a fine to the King, as was afterwards ordered by *Canutus*.

M. Paris in
vit. Eadrick.
Abb.

An. 1009.

Concil. Brit.

523.

Ll. Etheld.

31.

First-Fruits.

Ll. Inæ, c. 4.

Concil. Brit.

p. 185.

An. 693.

Concil. Brit.

p. 515.

Tytber.

Concil. Brit.

p. 298.

An. 787.

Concil. Brit.

259.

Ingulfus.

Gest. pontif.

Lib. 2. cap. 2.

An. 854.

After the first-fruits cometh to consideration the Revenue of Tythes, the which I find no publick Act of State to warrant, till the *Legatine* Council under *Offa*: Although the Canon was more ancient. The Bishop at the first was the general Receiver as well of these as of the former, and by him they were divided into three parts, and imployed one to the poor; another for the maintenance of the Church; and a third part for the maintenance of the Presbytery. But in future times many Acts of State succeeded concerning this, amongst which that grant of *Atbelwolfe* must be a little paused upon. Some Writers say that he gave the tenth Mansion, and the tenth of all his goods: but *Malmfbury* saith, the tenth of the Hides of Land; but in the Donation itself, as it is by him recited, it is the Tenth Mansion. But *Matth. Westm.* understands that he gave the Tenth part of his Kingdom, but in the Donation by him published it is *decimam partem terræ meæ*. In my opinion, all this being by tradition, little can be grounded thereupon. The form of the Donation itself is uncertain and various, the inference or relation more uncertain and unadvised; for if the King had granted that which was not his own, it could neither be accounted pious or rational. Nor do we find in the Donation that the King in precise words gave the Land, or the Tenth part of the Land of his Kingdom, but the Tenth of his Land in the Kingdom: And the exemplification published by *Matth. Westm.* countenanceth the same, albeit the Historian observed it not*. But suppose that the Kingdom joined with the King in the concession, and that it was the course to pass it only in the King's name, yet could not the Tenth Hide, Tenth Mansion, or Tenth part of the Kingdom be granted, without confusion in the possessions of the people. For either some particular persons must part with all their possessions, or else out of every man's possession must have issued a proportionable supply; or lastly a Tenth part of every man's possession, or House

The Regal
Revenues
could not be
aliened sans
common as-
sent. post. 31.

and Land, must be set forth from the rest; or some must lose all and become beggars, to save others: all which are to me equally improbable. Nevertheless I do not take the thing to be wholly fabulous, but may rather suppose that either a Tenth was given out of the King's own Demesnes, which is most probable; or else the Tenth of the Profits of the Lands throughout the Kingdom; and that it was by publick Act of State, and that Clause forgotten by Historians. And thus might a good precedent be led to *Alfred*, *Atbelstan*, and other Kings, who settled Tithes under payment of penalties, and appointed the times of payment, viz. The small Tithes at *Whitfontide*, and the great Tithes at *Abollantide*.

Concil. Brit.
p. 392.
An. 905.
Ibid. 527.
An. 1009.
Luminaries.
Concil. Brit.
p. 377.
Ibid. 545.
An. 1032.

Another Tribute was that of *Luminaries*, which by *Alfred* and *Guntbrun* was first settled by Law, although it had been before claimed by Canon. It was payable thrice a year, viz. *Hollantide*, *Candlemas*, and *Easter*, at each time half a penny upon every Hide of Land; and this was under a penalty also.

Plough-alm.
An. 905.

Another Income arose from the Plough, and under the name of *Plough-Alms*: At the first it was granted by *Edward* the Elder generally, and the value was a penny upon every plough; and in after-times it was ordained to be paid fifteen days after *Easter*.

An. 1009.

Soul feat.
Concil. Brit.
p. 571.
An. 1009.

Next comes a Fee at the death of the party, which was commonly called *Soul-shot*, and paid (before the dead body was buried) unto that Church where the dead party's dwelling was. So as they never left paying and asking so long as the body was above ground; and this it's probable turned into that fee which was afterwards called a *Mortuary*.

Glebe.
Concil. Brit.
p. 260.
An. 750.

The Incumbent also of every Church had *Glebe* laid to the Church; besides *obligations*, and other casual profits, as well arising from houses bordering upon the Church, as otherwise. All these four last were payable to the Priest of that particular Congregation, and had not their beginning till Parishes came to be settled.

Peter-pence.

* This Zeal
and church-
policy also in-
troduced the
anniversaries
of *Popes*, as
Gregory, &c.
See *L. Al-*
vredi. 39.

Lastly, the zeal of the charity of *England* was not so cold as to contain itself within its own bounds: they were a dependant Church upon *Rome*, and their old Mother * must not be forgotten. An alms granted; for under that lowly title it passed first, but afterwards called *Romscot* or *Romesfeogh*; or *Heord-penny*; for it was a penny upon every hearth or chimney payable at the Feast of *St. Peter ad vincula*; and therefore also called *Peter-pence*: it was for the Pope's use; and was settled under great penalties upon the defaulters. It arose by degrees and parcels: For first *Ina* the *Saxon* King granted a penny out of every house in his Kingdom: After him *Offa* granted it out of every dwelling house that had ground thereto occupied to the yearly value of Thirty-pence, excepting the Lands which he had purposed for the Monastery at *St. Albans*. This *Offa* had a much larger Dominion than *Ina*, and was King over three and twenty Shires. After whom *Æthelwolf* passed a new grant thereof out of his whole Kingdom, which was well-nigh all that part which was called *Saxony*, with this proviso nevertheless, that where a man had divers dwelling houses, he was to pay only for that house wherein he dwelt at the time of payment. Afterward *Edward* the Confessor confirmed that Donation out of such Tenements as had Thirty pence *viva pecunie*. If then it be granted, that the *Saxon* Subjects had any property in their Lands or Tenements, as no man ever questioned, then could not this charge be imposed without the publick consent of the people; and then the assertions of *Polydore* and the Monks, who tell us that *Ina* and *Offa* had made the whole Kingdom tributary to *Rome*, must needs be a mistake, both in the person, and the nature of the gift, seeing there

Concil. Brit.
p. 230.
An. 725.
Concil. Brit.
p. 311.
An. 791.
Ibid. 343.
An. 847.

Ibid. 621.

there

there is much more difference between an Alms and a Tribute, than between the King and the People. Now that it was an Alms, and not a Tribute, may appear, for that the original was a sudden pang of Zeal, conceived and born in one breath, while the King was at Rome; and therefore not imposed as a Tribute. Secondly, it was *ex regali munificentia*, and therefore free. Thirdly, it was expressly the gift of the King; for the Law of St. Edward, which provideth for the recovery of the Arrears of this Money, and enjoineth that they must be paid to the King, and not to Rome, as it was in the days of Canutus and Edgar, rendereth the reason thereof to be, because it was the King's Alms.

Secondly, that it was an Alms only from the King, and out of his own Demesnes, may seem not improbable, because first it was *ex regali munificentia*, which could never be affirmed if the gift had been out of the Estates of others. Secondly, it was granted only out of such houses as yielded Thirty pence Rent, called *vivæ pecuniæ*, because in those times Rent was paid in Victual; so as it may seem that only Farms were charged herewith: and not all mens Farms neither; for the general income will never answer that proportion. The particular hereof I shall in brief set forth. It appeareth in the former Quotation, that Offa charged this Levy upon the Inhabitants dwelling in Nine several Diocesses, viz. 1. Hereford, which containeth the City and County adjacent. 2. Worcester, containing the Cities and Shires of it and Gloucester. 3. Litchfield, containing Warwickshire, Cheshire, Staffordshire, Shropshire, and Derbyshire. 4. Leicester, with the County adjacent. 5. Lincoln, with the County adjacent. 6. Dorchester, whereto belongeth Northamptonshire, Oxfordshire, Buckinghamshire, Bedfordshire, Huntingdonshire, Cambridgeshire, and half Hertfordshire. 7. London, with Essex, Middlesex, and the other half of Hertfordshire. 8. Helmbam, with Norfolk. 9. Domuck or Dunwich, with Suffolk. In which nine Diocesses were two and twenty Shires. And he further granted it out of Spatingbenshire, (now Nottingham) whose Church belongeth to York. But in Ethelwolfe's time the Grant was enlarged, and extended into Fifteen Diocesses; which, together with their several charge out of the English Martyrology, I shall particularize, as followeth:

Fox Martyn.
P. 340.

	l.	s.	d.
Cantaur. Diocef.	07	18	0
London	16	10	0
Roffen	05	12	0
Norwich	21	10	0
Elienum	05	00	0
Lincoln	42	00	0
Cistrens.	08	00	0
Winton	17	06	8
Exon	09	05	0
Wigorn	10	05	0
Hereford	06	00	0
Batbon	12	05	0
Latisbury	17	00	0
Coventry	10	05	0
Ebor	11	10	0
	200	06	8

The

Brit. Ant. p.
18.

The whole Sum whereof not exceeding Two hundred pounds Six shillings and Eight pence, will not amount to Seven hundred pounds of now current Money, if the weight of a Penny was not less in those times than in the Reign of *Edward the First*, when it was the Twentieth part of an Ounce, and that the Twentieth part of a Pound, as by the Statute thereof made may appear. Nor can the difference be much (if any) in regard of the vicinity of the time of this extract to that of the Statute: for though no particular date thereof appear, yet it seemeth to be done after the Translation of the See from *Thetford* to *Norwich*, which was done in *William Rufus* his time; and after the erecting of the Bishoprick of *Ely*, which was in the time of *Henry the First*. Now albeit this charge was in future times diversly ordered and changed; yet upon this account it will appear, that not above Eight and forty thousand and Eighty Houses were charged in this time of *Edward the Second* with this Assessment; which is a very small proportion to the number of Houses of Husbandry in these days, and much more inferiour to the proportion of Houses in those times, if *Polydore's* observation be true, that in the Conqueror's time there were Sixty thousand Knights Fees; and as others, Fifty thousand Parishes. It may therefore be rather thought that none but the King's Farmers were charged herewith, notwithstanding the positive Relations of Writers, who in this case, as in most others, wherein the credit of *Rome* is engaged, spare not to believe lightly, and to write largely. And thus for their Sevenfold Church-Officers, we have also as many kinds of constant maintenance. One in Lands and Tenements, and six several kinds out of the Profits and the personal Estates, besides the emergent benefits of Oblations and others formerly mentioned.

C H A P. XII.

Of the several Precincts of Jurisdictions of Church Governours amongst the Saxons.

Malmf. gest.
Reg. lib. 1.
c. 4. 29.

Bed. hist. lib.
1. cap. 29.

Malmf. loco
citat.
Vit. Offe.
Malmf.
Conc. l. Brit.
133.
Antiq. Brit.
p. 54.
M. Westm.
An. 775.

THE Church-Officers thus called to the Drum and paid, are sent to their several charges over Provinces, Diocesses, Deaneries, and Parishes, as they could be settled by time and occasion. Before the *Saxons* arrival, *London* had the Metropolitan See, or was the chiefest in precedency; for Archbishops the *Britons* had none. Afterwards, by advice of the Wise-men, *Canterbury* obtained the precedency, for the honour of *Austin*, who was there buried. The number of Provinces, and their several Metropolitan Sees, was first ordered by advice of Pope *Gregory*, who appointed two Archbishops in *Saxony*; the one to reside at *Canterbury*, the other at *York*; and that each of them should have Twelve Bishops under him. But this could never be compleated till *Austin* was dead; as by the Epistle of *Kenulphus* to Pope *Leo* appeareth. Nor then had the Pope the whole Power herein intailed to his Triple Crown; for the same Epistle witnesseth, that the Council of the Wise-men of the Kingdom ruled the case of the Primacy of *Canterbury*. And *Offa* the King afterward divided the Province of *Canterbury* into two Provinces, which formerly was but one. And the Precincts of Diocesses have been altered ordinarily by Kings, or the Archbishops and their Synods, as the Lives of those first Archbishops set forth. *Theodore* had divided his Province into five Diocesses; and within a hundred years after *Offa*, we find it increased into eleven Diocesses.

Dio-

Diocesses have also been subdivided into inferiour Precincts *, called *Decanaries* or *Decanaries*, the chief of which was wont to be a Presbyter of the highest note, called *Decanus*, or *Arch-Presbyter*. The name was taken from that Precinct of the *Lay-power*, called *Decennaries*, having Ten Presbyters under his visit, even as the *Decenners* under their chief. The smallest Precinct was that of the Parish, the oversight whereof was the Presbyters work. They also had Abbeyes and other religious Houses; but these were however regular among themselves, yet irregular in regard of Church-government, whereof I treat.

Lj. Edw.
Conf. cap. 31:
Lindwood. l. i.
de constit. c. 11:

C H A P. XIII.

Of the manner of the Prelates Government of the Saxon Church.

HAVING discoursed of the Persons and Precincts, it now befalls to touch upon the manner of the Government of the Church by the *Saxon* Prelates; which was not wrapped up in the narrow closet of private opinion, but stated and regulated by publick Council, as well in the making as executing of Laws already made. This course was learned from antiquity, and inforced upon them by a *Roman* Constitution, in the case that concerned Archbishop *Theodore* and *Wilfred*, upon this ground, *Quod enim multorum concilio geritur nulli consentientium ingerat scandalum*. These are most ordinarily called Synods, although at the pleasure of the Relater, called also Councils, and are either Diocesan, or Provincial, or National, and these either particular or general. The general consisted of all the Bishops and Clergy; and such was the Synod under Archbishop *Dunstan* called. The National Synods were diversly called; sometimes by the Pope, sometimes by the King, as the first moving occasion concerned either of them. For Pope *Agatbo* in a Synod at *Rome*, ordered that a Synod should be called in *Saxony* (viz. *England*) *Sacrosancta auctoritate & nostra Synodali unitate*; and many Legatine Synods in succeeding times demonstrate the same. That the *Saxon* Kings also called them upon occasion, is obvious through all the Councils, and needless to instance amongst so many particulars. The Provincial Synods were sometimes convoked by the King, and sometimes by the Archbishop, and sometimes jointly. The Diocesan were called by the Bishop. In the National and Provincial, sometimes Kings moderated alone, sometimes the Archbishop alone, and sometimes they joined together. The Assistants were others, both of the Clergy and Laity, of several Ranks or Degrees; and it seemeth that Women were not wholly excluded; for in a Synod under *Witbered* King of *Kent*, Abbatises were present and attested the Acts of that Synod, together with others of the Clergy of greater degree. The matters in action were either the making or executing of Laws for Government; and (because few Laws passed that did not some way reflect upon the King and people, as well as the Clergy) the King was for the most part present, and always the Lords, and others: Yet if the matters concerned the Church in the first act, the King though present, the Archbishop was nevertheless President; as it befel at a Synod at *Chelshoe*, An. 747. and another at *Celchith* *, An. 816. And in the Reign of *Edward* the Elder, though the Synod was called by the King, yet the Archbishop was

Malmsh. gest.
pontif. lib. 3.
fo. 263.

Baronius,
An. 930.

Malmsh. gest.
pontif. lib. 3.
p. 263.
An. 680.

Concil. Brit.
p. 191, 310,
& 318.

Ibid. 316,
328, 337.

Concil. Brit.
245. 317. 387.
or Chelshoe.

* The Craft of the Prelates was to distribute their Spiritual Offices thro' the Kingdom, so as to influence and direct every part of the Temporal Government, and to actuate the whole for the Church's Good. Thus every Temporal Officer had a Spiritual Concomitant *ut supra*.

was President. Concerning all which it may be in the sum well conceived, that in the penning of the Councils aforesaid, either the Clergy (being the Penmen) were partial or negligent in the setting down of the right form; and that the King called these Assemblies by instance of the Archbishop, and sometimes presided in his own person, and sometimes deputed the Archbishop thereunto.

M. Westm.
An. 955. 958.
Concil. Brit.
479.

* or Sacra-
ment.
Ibid. 337.

Ibid. 319. 332.
Concil. Brit.
p. 334.

The executing of Laws was for the most part left to the Diocesan Synods; yet when the cases concerned great men, the more general Councils had the Cognizance, and therein proceeded strictly, sparing no persons of what degree soever. Examples we find hereof, amongst others, of one incestuous Lord, and two delinquent Kings, *Edwy* and *Edgar*. Nay they spared not the whole Kingdom; for in the quarrel between *Cenulphus* the King, and Archbishop *Wilfrid*, the whole Kingdom was under interdict for six years space; and no Baptism * administred all that time. Nor were they very nice in meddling with matters beyond their sphere, even with matters of Property; for at a Provincial Council (for so it is called) they bore all down before them, even the King himself, as in the case between *Cenulphus* the King, and the Archbishop of *Canterbury*, concerning the Monastery of *Cotbam*. The like also of another Synod concerning the Monastery of *Westburgb*: It's true, the Lords were present: and it may be said, that what was done, was done in their right; yet the Clergy had the rule, and begat the Child; and the Lay-Lords only might challenge right to the name. This concurrence of the Laity with the Clergy contracted much business, and by that means a customary power, which once rooted, the Clergy after they saw their time (though not without difficulty) turned both King and Lords out, and shut the doors after them, and so possessed themselves of the whole by Survivorship. But of this hereafter.

Mag. cent. 8.
cap. 9.

The particular Diocesan Synods were, as I said, called by the Bishops within their several Dioceses. The work therein was to preach the Word as a preparative, then to visit and enquire of the manners of the Clergy in the worship of God, and of all matters of scandal, and them to correct. These Synods were to be holden twice every year †, at certain times: and if they met with any matter too hard for them to reform, they referred it to the Provincial or National Synod.

C H A P. XIV.

Of Causes Ecclesiastical.

An. 446.

1. Heresy.

AS the power of Synods grew by degrees, so did also their work; both which did mutually breed and feed each other. Their work consisted in the reforming and settling matters of Doctrine and Practice. The first was the most ancient, and which first occasioned the use of Synods. In this Island the *Pelagian Heresy* brought in the first precedent of Synods that we have extant; and herein it will admit of no denial, but in the infancy of the Church the Teachers are the principal Judges of the nature of Error and Heresy, as also of the Truth; as the Church is the best guide to every Christian in his first instruction in the principles; but after some growth there is that in every Church and Christian, that makes itself party in judging of truth and Error jointly with the first Teachers. And therefore 'tis not without reason, that in that first

† i. e. As concomitant with the *Witenagemots*, which then were also held twice yearly. *Vide LL. Confessoris*, 55. & 56.

first Synod, although *Germanus* was called *Judex*, yet the people hath the name of *Arbiter*, and 'tis said that they did *contestare judicium*. Beda. hist. l. 1.

Blasphemy was questionless under Church-censure, but I find no footsteps of any particular Law against it *; yet in *Scotland* a Law was made to punish it with cutting out the Tongue of the Delinquent: But it may be feared that neither the Saxons nor the *Roman* Teachers, were so zealous for the honour of God's Name, as to regard that odious sin; unless we should account them so holy as that they were not tainted therewith, and so needed no Law. 2. Blasphemy. Concil. Brit. p. 341. An. 840. * See vid. Pref. Ll. Alvredi.

But *Apostacy* was an early sin, and soon provided against; the Church-censure was allowed of in *Britain* before the *Saxons* Church had any breath: Afterward it was punished by Fine and Imprisonment, by a Law made by *Alfred*, as he provided in like manner for other Church-Laws. 3. Apostacy. An. 314. Concil. Brit. 41. Ibid. 367.

The times anciently were not so zealous for due observance of Divine Worship, unless by the true Churchmen who were the Leaders therein; a foreign Canon was made to enforce that Duty long before, but it would not down with the rude Saxons: they, or the greater sort of them, were content to come to Church only to pray and hear the Word, and so went away. This is noted by that ancient Writer in nature of an imputation, as if somewhat else was to be done, which they neglected; this somewhat was the Mass, which in those days was wont to be acted after the sermon ended. And it's probable that if the Nobles were so ill trained up, the inferiour sort was worse; and yet find we no Law to constrain their diligence: or to speak more plainly, it's very likely the Saxons were so resolute in their Worship, as there was either little need of Law to retain them, or little use of Law to reclaim them. For it's observed in their late Psalter, that the *Roman* Clergy was not more forward to Image or Saint-worship, than the People were backward thereto; and therein shewed themselves the true Seed of their ancestors in *Germany*, of whom it's observed that they endured not Images, but worshipped a Deity which they saw *sola reverentia*. 4. False Worship. p. Canon. Apost. cap. 10. 5. Mass. Bed. hist. lib. 3. cap. 26. Mag. Cent. 7. cap. 6. Concil. Brit. p. 306. 6. Image Worship. Tacit. Mor. Germ.

Sorcery and *Witchcraft* they had in abomination: yet it was a sin always in a mist, and hard to be discerned but by the quick-sighted Clergy; and therefore it was left to their censure, as a sin against the Worship of God. This *Ethelbald* the *Mercian* King first endowed them with; and they alone exercised the Cognizance thereof till *Alfred's* time, who inflicted thereupon the penalty of Banishment: but if any were killed by enchantment, the delinquent suffered death by a Law made by *Æthelstan*. And thus by degrees became one and the same Crime punishable in several Jurisdictions, in several respects. 7. Witchcraft. Concil. Brit. 246. An. 745. Ibid. 377. Ibid. 405. An. 928.

Concerning *Perjury*, the Prelates had much to do therewith in future times; and they had the first hint from *Ina* the *Saxon* King's Grant to them of power to take Testimonies upon Oath, as supposing that the Reverence that men might bear to their Persons and Functions, would the rather overawe their Tongues in witnessing; that they would not dare to falsify, lest these knowing men should espy it, and forthwith give them their doom. But no positive law allowed them that power of sentence, till *Æthelstan's* Law gave it; and upon Conviction by the same Law, digested the delinquent's Oath for ever. 8. Perjury. Ll. Sax. fol. 4. An. 9, 28.

Sacrilege comes in the next place, being a particular Crime merely of the Clergymen's invention and naming; for before they baptized it, you might have well enough called it Theft, Oppression, or Extortion. This Crime the Prelates held under their Cognizance by virtue of that general Maxim, *That all wrong done to* 9. Sacrilege. Concil. Brit. p. 127.

Ann. 610.
I. i. 265.

10. *Simony.*

Concil. Brit.
163.

*Matrimonial
Causes.*

Beda. h. ft.
I. i. cap. 27.

Concil. Brit.
219.
Concil. Brit.
p. 427.
An. 944.

Bastardy.

Incest.
Concil. Brit.
p. 392.
An. 905.
Adultery.
Fornication.

the Church, must be judged by the Church. The first time that I can observe they challenged this power, was by *Egbert* Archbishop of *York* in the Seventh Century.

But nothing was more their own than *Simony*; and that may be the reason why we find so little thereof either for the discovery or correcting of it. All former Crimes were in their first act destructive to the Church, but this advantageous; and therefore though the Canons roar loud, yet the execution is not mortal, because it's bent against the dignity, and not the gain. And although the Canon would not that any Presbyter should be made, but presented therewith to some place to exercise his function in, yet it serveth not for those times when men were sent forth rather to make Flocks than to feed Flocks.

And yet the Theme of *Marriage* was the best Dish in all their Entertainment: They had the whole common-place thereof, with the Appurtenances, within the compass of their Text, before ever it attained the honour of a *Sacrament*. It was a branch of *Moses's* Law, whereof they were the sole Expositors, and so seemeth to be cast upon them by a kind of necessity, as an Orphan that had no owner. Nevertheless a passage in *Eusebius* seemeth to repose this Trust in the Civil Magistrate: for he relateth out of *Justin Martyr*, concerning a Divorce sued out by a godly Matron long before the Prelacy got into the Saddle, or the Clergy had the power of Judicature. And whereas *Lucius* taxed *Urbicius* the Magistrate for punishing *Ptolemy* who was guilty of no crime worthy of his cognizance in that kind, amongst other Crimes (enumerated by him, whereof *Ptolemy* was not guilty) he nameth the Crimes against the Seventh Commandment; intimating thereby a power in the Judge to have cognizance of those Crimes as well as others. But the Prelacy beginning to mount, nibbled at it in the second Centry, but more clearly in the fourth, when the persecutions were allayed, and men of Learning began to feel their Honour, and never left pursuit till they had swallowed the Bait, and exercised not only a Judiciary power in determining all Doubts and Controversies concerning the same, but challenged an Efficiency power in the *Marriage-making*. This Garland *Austin* brought over with him, and crowned the *Saxon* Clergy therewith, as may appear by his *Queries* to Pope *Gregory*: And thus the *Saxons* that formerly wedded themselves, became hereafter wedded by the Clergy. Yet the Civil Magistrate retained a supreme Legislative power concerning it, as the joint Marriages between the *Saxons*, *Britons*, and *Picts*, do manifest: For it's said of that Work, that it was effected *per commune concilium & assensum omnium Episcoporum, procerum, comitum, & omnium sapientum, seniorum, & populorum totius regni, & per præceptum Regis Inæ*: and in the time of *Edward* their King, were enacted Laws or Rules concerning Marriage; and so unto the Lay-power was the Ecclesiastical adjoined in this Work.

The Clergy having gained the Principal, with more ease obtained the Appurtenances, such as *Bastardy*, *Adultery*, *Fornication*, and *Incest*. There was some doubt concerning *Bastardy*, because it trenched far into the Title of Inheritance; and so they attained that *sub modo*, as afterward will appear. The Laws of *Alfred* and *Edward* the elder, allowed them the Cognizance of *Incest*; although nevertheless the Civil Magistrate retained also the cognizance thereof, so far as concerned the penalty of the Temporal Law. *Adultery* and *Fornication*, they held without controul; yet in the same manner as the former: for the Civil Magistrate had cognizance thereof, so far as touched the Temporal penalty. And

to give them as much as can be allowed, it's probable that in all or most of the Cases foregoing, they had the honour to advise in determining of the Crime, and declaring the Law, or defining the matter; for in those ignorant times it could not be expected from any other. Concil. Brit. p. 358.

But how the cognizance of *Tytbes* crept under their wing, might be much more wondered at, for that it was originally from the Grant of the People: nor can a better ground be found by me than this, that it was a matter of late original: For till the Seventh Century the times were troublesome; and no settled maintenance could be expected for the Ministry, where men were not in some certainty of their daily Bread. And as it will hardly be demonstrated that this Title was ever in any positive National Law before the time of *Charlemain*, in whose time, by a Synod of Clergy and Laity, it was decreed that *Tytbes* should be gathered by selected persons, to pay the Bishops and Presbyters: So neither can I find any Saxon National Constitution to settle this duty, till *Alfred's* time, although the Churchmen had them as a *voluntary Gift*, (so far as touched the *quota pars*) for the space of well-nigh a hundred years before. But *Alfred* made a National Law, under a penalty, to enforce this Duty; which the Canon could not wring from the Saxons, how dreadful soever the Censure proved. And by this means the Church had their remedy by Ecclesiastical censure for the matter in fact, and also the Civil Magistrate the cognizance in point of Right, albeit future times introduced a change herein. Synod. Durien. cap. 7. An. 785. Rabban. Epist. ad Hadubrand. Concil. Brit. p. 277.

C H A P. XV.

A brief Censure of the Saxon Prelatical Church Government.

THIS that I have said, might at the first view seem to represent a curious Structure of Church-policy, which might have put a period to time itself; but (to speak *sine ira & studio*) the height was too great, considering the foundation, and therefore ever weak, and in need of props. The foundation was neither on the rock, nor on good ground, but by a Gin screwed to the Roman Consistory, or like a Castle in the Air, hanging upon a pin of Favour of Kings and great men. At the first they thought best to temporize, and to hold both these their strings to their Bow; but feeling themselves somewhat under-propped by the Consciences of the ignorant people, they soon grew wondrous brave, even to the jealousy of Princes; which also was known so notoriously, that the publick Synods rang, *That the Prelates loved not Princes, but emulated them, and envied their greatness, and pursued them with detraction.* And if the Cloth may be judged by the List, that one example of *Wilfred* Archbishop of *York* will speak much. He was once so humble-minded, as he would always go on foot to preach the Word; but by that time he was warm in his Archbishop's Robes, he was served in Vessels of Gold and Silver, and with Troops of Followers, in such Gallantry, as his Pomp was envied of the Queen. A strange growth of Prelacy in so small a space as Eighty years, and in the midst of stormy times, such as then afflicted this poor Country! But this is not all; for never doth Pride lead the Way, but some other base Vice follows. I will not mention the lives of the Monks, Nuns, and other Concil. Brit. p. 254. An. 747. Malmsh. gest. pontif. lib. 3. An. 680.

Bonif. epist.
ad Cutber-
tum. An. 745.

Concil. Brit.
P. 379.

Concil. Brit.
p. 248, & 253.
An. 747.

other Clerks; *Malmfbury* speaks sufficiently of their Luxury, Drunkenness, Quarrelling, and Fighting. Others witness thereto, and tell us that the Clergy seldom read the Scripture, and did never preach, and were so grossly ignorant, that *Alfred* the King being a diligent Translator of *Latin* Writers into the *Saxon* Tongue, rendered this reason, *Because they would be very useful to some of his Bishops that understood not the Latin Tongue*. Nor were the Presbyters of another dye; for that King bewailing their ignorance, in his Letter to *Wolfgangus*, saith, *That those which were de gradu spirituali, were come to that condition, that few of them on this side Humber, could understand their Common-prayers, or translate them into Saxon; and so few, as I do not (saith he) remember one on this side the Thames when I began to reign*. And the Synod that should have salved all, covers the Sore with this Canonical Plaister, that those of the Clergy that could not say *Domine miserere* in *Latin*, should instead thereof say, *Lord have Mercy upon us* in *English*. It was therefore a vain thing for the Clergy to rest upon their Works, or Title of *Divine Right*; their great Pomp, sacred Places, and favour of Kings, commended them to the Administration, or rather Adoration of ignorant people; and the favour of the *Roman* Chair, unto the regard of Kings: who maintained their interest with the Conclave on the one side, and with the People on the other side, by their means; and so they mutually served one another. It cannot be denied but the Pope and Kings were good Cards in those days; yet had the Prelacy maturely considered the nature of the *Saxon* Government, so much depending upon the people, they might have laid a more sure foundation; and attained their ends with much more ease and honour. I commend not the base way of Popularity by Principles of Flattery, but that honourable service of Truth and Virtue which sets up a Throne in the minds of the Vulgar, few of whom but have some sparks of Nature left unquenched: for though Respect may chance to meet with Greatness, yet Reverence is the proper Debt to Goodness; without which we look at great men as Comets, whose influence works mischief, and whose light serves rather to be gazed upon, than for direction.

Constab. 10.
208, 263.

The foundation thus happily laid, the Progress of the building was no less irregular in regard of their ends that they aimed at: For first, they admitted the Laity into their Synods; who were not so dull but could espy their ambition, nor so base-spirited as to live in slavery after conviction. This Error was espied I confess, but it was too late; and though they reformed it, yet it was after Four hundred years labour. And in the mean time, by the contentions of the Clergy amongst themselves, Kings had first learned so much of their Supremacy, and the Laity so much of their Liberty, as they began to plead with the Clergy, and had brought the matter to issue, before the Synod could rid themselves of these *Lay-Spectators*, or rather *Overseers* of their ways and actions. A second Error was the yoking of the Bishops power under that of the Synods: for they had little or no power by the Canon that was not under their controul, neither in admission or deprivation of Presbyters or others, determining of any cause, nor passing sentence of Excommunication: And this could not but much hinder the hasty growth of Antichrist's power in this Kingdom. Nor could it ever be compleated so long as the Synods had the chief power. Nevertheless the inthralled spirits of the Clergy, and terrour of the Papal thunder-bolt, in continuance of time surmounted this difficulty, and Synods became so tame and easily led, as if there had been but one Devil

Devil to rule amongst them all. For if any quick eye or active spirit did but begin to peep or stir, the Legate *e latere* soon reduced him into rank, and kept all in awe with a *Sub pœna* of unknown danger. A third error, was the allowing of peculiars and exemptions of Religious Houses from ordinary jurisdiction; and this was an error in the first concoction, a block in the way of Prelacy, and a clog to keep it down. This error was soon felt, and was occasion of much mutiny in the body Ecclesiastical; but exceeding profitable for *Rome*, not only in point of Revenue by the multitude of Appeals, but especially in maintaining a party for the *Roman* See, in case the Prelacy for *England* should stumble at the Supremacy of *Rome*. Otherwise it seemed like a Wen upon the body, rather than any *Homogene* Member; and without which certainly the *English* Prelacy had thriven much better, and the *Roman* Chair much worse. In all which regards, I must conclude, that the Prelatical Government in *England* was as yet like a young Bear not fully licked, but left to be made compleat by time and observation.

C H A P. XVI.

Of the Saxons Commonwealth, and the Government thereof; and first of the King.

HAVING already treated of the *Saxon* Church, in order I am now come to the *Republick*, which in all probability will be expected to be suitable to their Original in *Germany*; whereunto having relation, I shall first fall upon the persons and degrees abstractively, then in their assemblies, and lastly of their Laws and Customs. The *Saxons* in their first state in *Germany* were distributed into four Classes, *viz.* the *Nobles*, the *Freemen*, the *Manumitted* persons, and the *Bond-men*. Under the Nobility, and from them, arose one that was called a *King*, of whom I shall speak apart: the two last differed only in the bare liberty of their persons, and therefore may be comprehended under one head, as they were in their original.

A *King* amongst the old *Saxons* in probability was anciently a Commander in the field, an Officer *pro tempore*, and no necessary Member in the constitution of their state: for in time of peace, when the Commonwealth was itself, the executive power of the Law rested much in the Nobility; but in times of War, and in publick distractions, they chose a General, and all swore obedience unto him during the War; it being finished, the General laid down his command, and every one lived *æquo jure, propria contentus potestate*. But in their transmigration into *Britain*, the continuance of the war causing the continual use of the General, made that Place or Office to settle and swell into the condition of a *King*; and so he that was formerly *Dux* became *Rex*; there being no more difference in the nature of their places, than in the sense of the Words; the one signifying to *Lead*, the other to *Govern*; so as he that formerly was a *servant for the occasion*, afterwards became a *servant for life*; yet cloathed with Majesty, like some bitter Pill covered with Gold, to make the *service* better tasted. Nor was the place more desirable, if duly considered. For first, his Title rested upon the good opinion of the *Freemen*; and it seemeth to be one of the best Gems of the Crown, for that

Wittk. in gest.
Saxon. lib. 1.

M. Westm.
An. 672.
M. Westm.
An. 912, 919.
Tacit.
Cragius.

that he was thereby declared to be most worthy of the love and service of the people. Yet was the ground of their Election so uncertain, as a man might imagine that sometimes there appeared more of the Will than of the Judgment in it; that it might be said to be the more free, for they neither excluded women nor children further than present occasions led them. The *West Saxons* deposed *Seburg* their Queen, because they would not fight under a Woman; but the *Mercians* obeyed *Elfred* their Queen, and under her fought valiantly with good success against the *Danes*; imitating the Custom of the *Sitones* or *Norwegians* in *Germany*: as they might borrow it from the *Lacedemonians*. A Custom it was so much the more honourable, by how much it demonstrateth Freedom, and that the worth of the people rested not so much in the head, as it's diffused through the whole body. And it seemeth to run in the blood of an *Englishman*, even to this day, to be as brave under a single Queen, as under the most valiant King, if not much more; and still to strive to be as famous for the defence of Majesty wherever they set it, as the *Britons* were of old. Nor were they different in their respect of age, from that of the Sex; for though after the death of *Edmond*, *Edwin* or *Edgar* were to have succeeded in the Crown by the right of Descent, yet the States would not admit them, because they were Minors; but the *Mercians* admitted *Kenelme* a Child of seven years old to be their King. They likewise excluded not Bastards till the Clergy interposed; for they having wound themselves into the Councils of the Kingdom, procured a Constitution to back them in the Election of King's *Legitimé*, &c. *Let the Kings be legally chosen by Priests and Elders, and not such as are begotten by Adultery or Incest*: which Constitution was made in a *Legatine* Council, and confirmed by great *Offa*. The rule of their Election was the same with that in *Germany*, viz. to elect the chiefest out of the chiefest Family, that is, the chiefest for worth, not by descent; yet the honour they bare to their brave Kings who had deserved well, made some to honour their Posterity, and to chuse their eldest after their decease; and so in time Crowns were taken up by custom, and Election oftentimes subsequent was accounted but a ceremony, unless the people will dispute the point.

Mag. cent. 8.
cap. (2.) 9.
An. 747.
Tacitus.

Tacitus.

Concil. Brit.
p. 397.

Ll. Inz.
Lamb.

Mirror. cap. 1.
Sect. 2.

Wigorn.
An. 1016.

Secondly, this Election was qualified under a stipulation or covenant, wherein both Prince and People were mutually bound each to other; the people to defend their King, which the Historian saith was *præcipuum Sacramentum*; and the Prince to the people to be no other than the influence of the Law, suitable to that saying of *Æthelstan* the Saxon King, *Seeing I according to your Law allow you what is yours, do you so with me*; as if the Law were the sole umpire between King and people, and unto which not only the people, but also the King must submit. The like whereunto, *Ina* the great Saxon King also, *No great man*, saith he, *nor any other in the whole Kingdom may abolish the written Laws*. Kings furthermore bound themselves (at their entrance into the Throne) hereunto by an *Oath*, as 'tis noted of *Canutus*, unto whom, after *Ætheldred* was dead, the Bishops, Abbots, Dukes, and other Nobles, came and elected him to be their King, and sware Fealty unto him; and he again sware to them, that *secundum Deum, & secundum seculum*, &c. viz. *according to the Laws of God, and of the Nation, he would be a faithful Lord to them*. 'Tis probable, I grant, that the *præcipuum Sacramentum* formerly mentioned, was in the first nature more personal for the defence of the person of their Leader, whilst he was their Captain: because it much concerned the good of the Army, and without whom all must scatter, and bring all

all to ruin; and this the words of the Historian do evidence. But the safety of the whole people depended not on him after the War was done, and therefore the Oath tied them not any further: nor did the safety of the people afterwards, when as the Saxons entered this Land, so absolutely rest upon the person of the King, especially if he proved unfit to manage the work: and therefore the fealty that the people swore to their King, was not so absolutely determined upon their (Kings) persons, otherwise than in order to the publick weal, as may appear from the Laws of the Confessor, who was within thirty years after the Reign of *Æthelstan* formerly mentioned. The words in *English* run thus: *All the people in the Folk-mote shall confederate themselves as sworn Brethren, to defend the Kingdom against strangers and enemies, together with their Lord the King; and to preserve his Lands and honours together with him with all faithfulness, and that within and without the Kingdom of Britain they will be faithful to him as to their Lord and King.* So as 'tis evident, the Saxons fealty to their King, was subservient to the publick safety; and the publick safety is necessarily dependant upon the liberty of the Laws. Nor was it to be expected that the Saxons would endure a King above this pitch. For those parts of *Germany* (whence they came) that had the Regiment of Kings (which these had not) yet used they their Kings in no other manner than as *Servants of State*, in sending them as Embassadors and Captains, as if they claimed more interest in him than he in them: And the Historian saith expressly, that amongst those people in *Germany* that had Kings, their Kings had a defined power, and were not *supra libertatem*. And this Maxim of State became afterwards privileged by Sanctuary: for by the growth of Antichrist, not only the Clergy, but even their Tenants and Retainers were exempt from the reach of Kings; who even by their own concession allowed of a Law that cut the throat of their undefined Prerogative, viz. *That if the King defend not his People, and especially Church-men from injury, nec nomen Regis in eo constabit, verum nomen Regis perdit.* Which Law however it might pass for current Divinity in those days, yet 'tis strange it should get into a publick Act of State. Nor was this a dead word; for the people had formerly a trick of deposing their Kings (when they saw him peep above the ordinary reach) and this was an easy work for them to do, where ever Neighbouring Princes of their own Nation watched for the windfalls of Crowns. This made the Monarchical Crown in this Land, to walk circuit into all parts of the Country to find heads fit to wear it, until the *Norman* times.

Thirdly, the Saxons had so hammered their Kings in their Elections, and made them so properly their own, as they claimed an interest not only in the person of their Kings, but also in their estates*; so as in some respects they were scarcely *sui juris*. For King *Baldred* had given the Mannor of *Malings* in *Sussex* to *Christ-Church* in *Canterbury*; and because the Lords consented not thereto, it was revoked, and King *Egbert* afterwards made a new grant by advice of the Lords; which shews that the Demesnes of the Crown were holden sacred, and not to be disposed of to any other use, though pious, without the consent of the Lords: and herewith concur all the *Saxon* infeodations, attested and confirmed by Bishops, Abbots, Dukes, and others of the Nobility, under their several hands.

Nevertheless, Kings were not then like unto plumed Eagles, exposed to the charity of the Fowls for food, but had a Royal maintenance suitable to their Majesty.

* The King's Demesnes were, *publica Emolumenta Regni*, wherein the People had an Interest; *Æge*, unalienable by the King. *ante 19.*

ex-Tacitus

Li. Sax. Ed. cap. 17.

M. Westm. An. 756, 758. Wigorn. An. 755.

Concil. Brit. 340.

Tacitus.

Tacitus.

Mir. 101. 298.
Ll. Edw. c. 14.Malmfb. gest.
pontif. lib. 3.
gest. Reg.
lib. 1. cap. 4.
M. Paris An.
1095.

jefty. Their power was double, one as a *Captain*, the other as a *King*; the first was first, and made way for the second. As *Captain*, their power was to lead the Army, punish according to Demerits, and according to Laws, and reward according to Discretion. As *Captain*, they had by ancient Custom the spoil left to their ordering by permission of the Army, *Exigunt Principis liberalitate illum Bellatorem equum, illam cruentam & victtricem frameam*; and they were not wont in such cases to be close handed (*per bella raptus munificentiae materia*) the spoils in these wasted parts of *Germany* bring little other than Horses and Arms. But after they came into *Britain*, the change of Soil made them more fat; Horses and Arms were turned into Towns, Houses, Lands, and Cattle; and these were distributed as spoils amongst the *Saxon* Soldiers by their Generals; and this redounded to the maintenance of the State and Port of the great men, who were wont to be honoured *non stipendiis sed muneribus*; and the people used *ultra & viritim conferre principibus, vel armentorum vel frugum aliquid*. But now upon the distribution of conquered Towns, Houses, Lands, and Cattle in *Britain*, a yearly product of Victuals or other service was reserved and allowed to the *Saxon* Kings by the People; as the people allowed to *Joshua* his Land, *Jos. 19. 49*. So as they needed no longer the former course of Offerings, but had enough to maintain their Royal port, and great superfluity of Demesnes besides; as their charity to the Churchmen does sufficiently evidence. And by this means all the Lands in *England* became mediately or immediately holden of the Crown, and a settled maintenance annexed to the same; besides the casual profits upon emergencies, or perquisites of *Felons* or *Fugitives* goods, mines of Gold and Silver, *Treasure trove*, *Mulcts* for offences, and other privileges, which being originally in the Kings, were by them granted, and made *Royalties* in the hands of Subjects, as at this day.

To the increase of Majesty and maintenance, there was an access of power, not to make, dispense with, or alter Laws, but to execute and act the Laws established: and against this power there was no rising up, so long as it, like an unfeathered arrow, gadded not at random. It's true, the Churchmen or Prelates checked them often, but could never give them the mate. For peace sake, Kings many times yielded much; yet would no King of *Saxon* principles allow of any Canon that extolled the Clergy's Authority above that of Kings. And though the placing and displacing of Bishops seemed to be all Ecclesiastical work, yet would not the Kings altogether connive (as the examples of *Ina* in placing a Bishop in *Wells*; *Offa*, in making two Provinces of one; *Cenulphus*, in restoring *Polydorus*; *Elfrid*, in deposing *Wilfrid*; and *Edward* the Confessor, in making *Robert Nor-man* Archbishop of *Canterbury*, may induce into opinion:) and for their own safety sake, the Prelates thought it wisdom for them sometimes to stoop to that power that at other times they must be beholden to. And therefore though in *Synodical disputes* they would hold with the Canon, yet in matters of *Aelion*, would suit with the occasion, and thereby taught Princes to account of Canons but as Notions; and politickly to put the honour of Commissioners upon these men. Thus the current of both powers passing in one channel, made the people drink double Beer at once: the turns both of Pope and King were competently served, and these men had the honour of the two-handed Sword; and all seemed composed into a fair compromise. But the Popedom finding its Authority becalmed, endured this but as a burthen, till Pope *Nicholas* the second's time, who by the like trick commended all to

the Crown, as from the Papal Benediction. For *Edward* the Confessor, upon his foundation of the Abbey of *Westminster*, sent to the Pope for his allowance and confirmation of what he had done, or was to do; and to make way for the more favour, sent presents, and a confirmation of *Rome*scot. The Pope was so inflamed with such an abundant measure of blessing, as he not only granted the King's desire, but also discharged that Abbey from ordinary jurisdiction, made it a *peculiar*, subject only to the King's visitation, and concluded his Bull with this Horn, *Vobis vero & posteris vestris regibus committimus advocacionem & tuitionem ejusdem loci, & omnium totius Angliæ Ecclesiarum; & vice nostra, cum concilio Episcoporum & Abbatum, constitutis ubique quæ justa sunt.* How the King took the conclusion, I find not, but he could never make better use than by way of *estoppel*, unless he meant to sacrifice his own right as a thank-offering to a shadow, which I find not that he or his next Successors ever did. But as touching the Laity, Histories do not touch upon any conceit of withdrawing Monarchical power. It's true, Kings had their excesses, yet all was amended either by the body of the people, when they pleased to examine the matter, or by the Princes fair compliance when complaint was made, and so the Law was saved. And thus upon all the premises I shall conclude, that a Saxon King was no other than a *primum mobile* set in a regular motion, by Laws established by the whole body of the Kingdom.

Concil. Brit.

p. 634.

An. 1066.

Li. Canut.

cap. 67.

C H A P. XVII.

Of the Saxon Nobility.

THE ancient Saxon Nobility in Germany were the chiefest in action both in War and in Peace. That rank of men was continued by three means, viz. by Birth or Blood, by Valour, and by Wisdom. The first was rather at the first a stem arising out of the last two, than a different degree or kind: for Noble blood was at the first ennobled by brave actions, afterward continued in their honour to their Posterity, till by as base courses it was lost, as it was gained by worthy Achievements: these were called *Adelungi*. The Nobility of Action consisted either in matters of War or of Peace. Those of Peace arose principally from Wisdom, which being gained for the most part by much experience, were therefore called *Aldermanni*, or elder men. The Nobility of War arose somewhat from valour or courage with wisdom, but more from good success: for many brave and fortunate Commanders have not been very daring; and the bravest spirits, though wise, have not been ever honoured with good success: these were called *Heretobii*. Nevertheless all these names or titles were used promiscuously in following times, and all called *Nobiles*: But both that, and *Duces*, *Satrape*, and *Comites*, were all of the Roman Dialect, as the former were of the Saxon. Time also brought others into this honourable Band, viz. The great Officers of the King's Household, and their attests are found amongst the King's Charters, amongst the Nobles; and that much advanced the price of Kings; for he that is worthy to be not only Lord above Nobles, but Master of some, may by a little courtesy prevail over all. This starry Heaven had several Orbs; some so high, as in common esteem they were next the Imperial Heaven, having a tincture of Royal Blood, and at the next door

Li. Edw. cap.

35.

Nitard. lib. 4.

Tacitus.

to the Throne: Others, though not of so clear light, had nevertheless no less powerful influence upon the people, but rather more, by how much more nigher to them. Their power in matters of Peace or Government of the Commonwealth, was exercised either collectively, or apart and severally. In their meetings they ordered the smaller emergencies of the publick in convocating and directing the

* (De Majoribus omnes, i.e. the Commons.)
Tacitus.

people. *De minoribus rebus consultant principes* *. These *minora* are such as are subservient to the *majora*, and *pro hic & nunc* require sudden order touching any particular part or member of the Commonwealth. At other times they visited their several Territories or Circuits, hearing and determining matters of Controversy, and executing Judgment according to the known Laws, *Principes jura per pagos vicosque reddunt*; yet they had *Comites* of the Country joined with them, whereof afterward,

Tacitus.

This was their course in *German Saxony*; but in *England* the new stem of Kingly power, arising higher than all the rest, sucked much from them, and kept them under: for the *judiciary power* was in time drawn up into the Regal order, and the Lords executed the same as Deputies from and under him, designed thereto by

Minor. cap. 5.
Sect. 1.

Writs and Commissions, as it is more particularly noted of King *Alfred*. The Lords thus lessened in their *judiciary power*, carried the less authority in their *Votes* and Consultations. The King was a perpetual Moderator in that work, and it was no small advantage he had thereby to sway the *Votes*. Men that are advanced, if they have any excellency, soon gain admiration; and it's a hard thing for one that hath yielded his heart to admiration, to keep it from adoration. This hath mounted up Kings to the top more than their own ambition, and made them undertake what they ought not, because we esteem more highly of them than we ought. I speak not against due, but undue Obedience; for had the *Saxon* Lords remembered themselves, and the true nature of the authority of their King, they needed not to be amazed at their check, nor to give way to their passion, as they did many times, and advised others to do the like. Nor had Kings by degrees become beyond controul, and incapable to be advised. This error the Lords espied too late, and sometimes would remember their ancient right and power, and did take the boldness to set a Law upon the exorbitancy of their King, as in that case of *Aetbelwolf* and his Queen amongst others may appear: but that was like some enterprizes, that owe more to extremity of occasion, than to the courage of the undertaker.

Concil. Brit.
P. 333.

M. Westm.
An. 854.

C H A P. XVIII.

Of the Freemen amongst the Saxons.

Cæf. Com.
lib. 6.

THE next and most considerable degree of all the people, is that of the *Freemen*, called anciently *Frilingi*, or *Free-born*, or such as are born free from all yoke of Arbitrary power, and from all Law of compulsion, other than what is made by their voluntary consent; for all *Freemen* have votes in the making and executing of the general Laws of the Kingdom. In the first they differed from the *Gauls*, of whom it is noted, that the *Commons* are never called to Council, nor are much better than servants. In the second they differ from many free people, and are a degree more excellent, being adjoined to the Lords in judicature,

both

both by advice and power, *consilium & autoritas adjunt*: And therefore those that Tacitus. were elected to that work were called *Comites ex plebe*, and made one rank of *Freemen* for wisdom superiour to the rest. Another degree of these were beholden to their Riches, and were called *Custodes Pagani*, an honourable title belonging to Lamb. in 4. Military Service; and these were such as had obtained an estate of such value, as fol. 72. that their ordinary Arms were a Helmet, a Coat of Mail, and a gilt Sword. The rest of the *Freemen* were contented with the name of *Ceorles* or *Pagani*, viz. *Rural Clowns*, who nevertheless were the most considerable party both in War and Peace; and had as sure a title to their own liberties, as the *Custodes pagani* or the *Country Gentlemen* had.

C H A P. XIX.

Of the Villains amongst the Saxons.

THE most inferiour rank amongst the *Saxons* were those that of latter times were called *Villains*; but those also antiently divided into two degrees, the chiefer of which were called *Free laxzi*. These were such as had been Slaves, but had purchased their freedom by desert; and though they had escaped the depth of bondage, yet attained they not to the full pitch of *Freemen*; for the Lord might acquit his own title of *Bondage*, but no man could be made *free* without the act of the whole body. And therefore the Historian saith, that they are not *multum supra* Tacitus. *servos*, or scarce not servants. They are seldom of account in any Family, never in any City: but in Kingdoms sometimes advanced above the *Freemen*, yea, above Nobles. Those are now-a-days amongst the number and rank of such as are called *Copy-holders*, who have the privilege of *Protection* from the Laws, but no privilege of *Vote* in the making of Laws.

The most inferiour of all, were those which were antiently called *Laxzi* or *Slaves*; those were the dregs of the People, and wholly at the will of their Lord, Tacitus. to do any service, or undergo any punishment. And yet the magnanimity of the *Saxons* was such, as they abhorred Tyranny: and it was rarely used amongst them, by beating, torture, imprisonment, and other hard usage, to compel them to serve; they would rather kill them as Enemies. And this wrought Reverence in these men towards their Lords, and maintained a kind of generosity in their minds, that they did many brave exploits; and many times not only purchased their own freedom, but also brought strength and honour to the Kingdom. And though the insolency of the *Danes* much quelled this *Saxon* Nobleness, yet was it revived again by the Confessor's Laws, which ordained, *That the Lords should so demean themselves* Ll. Confess. *towards their men, that they neither incur guilt against God, nor offence against the King; or which is all one, to respect them as God's people, and the King's Subjects.* And thus much of the several degrees of men amongst the *Saxons*, being the materials of their Commonwealth; a model whereof in the making and executing of the Laws, and manner thereof, now next ensueth.

C H A P. XX.

Of the grand Council of the Saxons called the Micklemote.

Tacitus. **I**T was originally a Council of the *Lords* and *Freemen*; afterwards, when they assumed the title of a Kingdom, the *King* was a Member thereof, and generally President therein; but always intended to be present, though actually and in his own person by emergent occasions he may be absent, and sometimes by disability of his person he be unmeet to vote or be President in such an Assembly. As it was in the Council at * *Clano* or *Cleve* in *Wiltshire*, when the great case between the Monks and married Priests was concluded; the King was absent, as the story saith, because of his Minority; and yet if Writers say true, he was then in the sixteenth Year of his age. The Lords were also nevertheless in the same condition of privilege as formerly; and though it appeareth that the King had gotten the privilege of summoning the grand Meeting in his own name, yet it was by advice of the great men †; and being met, their Votes were no other in value than as formerly: for all their Laws were *ex consilio sapientum*, and (for aught can appear out of antiquity) the vote of the meanest continued as good as of the greatest, *arbitrium est penes plebem*. And thus the *Micklemote* or *Wittagenmote* of the Saxons in *England*, continued in the *King*, *Lords*, and *Freemen*, by the space of one hundred and fifty years, and in some parts of *England* nigh two hundred years before ever the *Roman* Bishop's foot entred, or the *Roman* Clergy crept into the Councils of State. Afterwards the Prelates were admitted *de bene esse*, for advice, as *sapientes*, and continued by allowance; how canonically, *ipsi viderint*, for I understand it not (especially as the Scripture was then expounded) *Nemo militans Deo implicet negotiis secularibus*: yet if they be allowed (what in those days they ordinarily took up) a degree of *Policy* above *Devotion*, that knot is also soon untied. I say they entred as *Sapientes*, not as *Prelati*, or Church-governours; for then they had holden the same power in Church-matters agitated in the *Wittagenmote*, that they had usurped in their Synods which they held only for Church-visitation; which they could never have, because the *Sapientes Regni* had their votes therein as freely as they. Nor could the Prelates by any Law entitle themselves to such power or privilege, so contrary to the privilege of the *Wittagenmote*. For though it be true, that the *German* Priests had a liberty to be present in these grand Assemblies, and to have some presidency therein, as to command silence, &c. yet it is no title to these, unless they will interest themselves, as their Successors, to possess by a *jus Divinum* that *jus Diabolicum* (which those Priests formerly had) in a way of immediate providence; somewhat like the possession of the Mantle of *Elijah* found by *Elishab*. They might, I grant, plead the title from Kings; but, it must be granted also, that Kings as yet had no more power over the Church than in the Commonwealth. Nor could they have that from the Lords, which the Lords never had, but was ever accounted among the *majora*, and of which the *Wittagenmote* had the only cognizance, as it will appear in some particulars ensuing.

Tacitus.

Unto the King, Lords, and Clergy, must be added, as I said, the *Freemen*, to make up the *Micklemote* compleat; and though it be true that no monument of story speaks of this grand Meeting from their being in *Germany*,
until

until after the coming of *Austin*; yet whenas the *Saxon* Histories then find them in the same condition that the *German* story leaves them, it is very probable that in the interval they continued their wonted custom, although they had no Learning to leave monuments thereof unto the world. And hereof the examples are not rare, in those remembrances that those ancient times have left us. For within six years after *Austin's* arrival, *Æthelbert* calls a Common-Council *tam cleri quam populi* * *Bede says Anno 613. See Wilkins LL. Sax. p. 1. Concil. Brit. 126. Ll. Sax. Lamb. Cantab. fol. 1. Ibid. fol. 22. Ibid. fol. 53.* *Ina* after him made Laws *suasu & instituto Episcoporum, omnium senatorum, & natu majorum sapientum populi; in magna servorum Dei frequentia.* *Alfred* after him reformed the former Laws *consulto sapientum.* After him *Æthelstan* called a Council, in which was the Archbishop, and with him the *Optimates & sapientes frequentissimi*, besides others, whereof I shall treat now that I come to the matters handled in this Court.

The matters in agitation in the *Wittagenmote* generally, were all both of publick and private concernment. That which concerned the publick, were such as regarded removal of inconveniences, such as are Laws for Leagues and Affinity with other Nations for preventing of War. And thus became the *Saxons* and *Britons* united, and the mortal feud between those two Nations laid aside, and they made one: And the *Saxons* and *Danes* reconciled, by a Covenant agreed unto, and sworn between both Nations. The like also may be said of their making of War of defence against foreign Invasion. Matters of publick and general charge also were debated and granted in that Assembly, as the payment of Tithes, it is said they were granted *Rege, Baronibus, & Populo.* Such also as concerned the Church; for so *Edwin* the King of *Northumberland*, upon his marriage with a Christian Lady, being importuned to renounce his Paganism, answered, he would so do, if that his Queen's Religion should be accounted more holy and honourable to God by the wise Men and Princes of his Kingdom. And all the Church-Laws in the *Saxons* time were made in the *Micklemote*. Monasteries were by their general consent dedicated, and their Possessions confirmed: The City of *Canterbury* made the Metropolitan, &c. Matters also of private regard were there proceeded upon, as not only general Grievances, but perverting of Justice in case of private persons: as in that Council called *Synodale concilium* under *Beornulfus* the *Mercian* King, *quæsitum est quomodo quis cum justitia sit tractatus, seu quis injuste sit spoliatus.* The name of which Council called *Synodal*, mindeth me to intimate that which I have often endeavoured to find out, but yet cannot, viz. that there was any difference between the general Synods, and the *Wittagenmote*, unless merely in the first occasion of the summons. And if there be any credit to be allowed to that book called, *The Mirror of Justice*, it tells us, that this Grand Assembly is to confer of the Government of God's people, how they may be kept from sin, live in quiet, and have right done them, according to the Customs and Laws; and more especially of wrong † done by the King, Queen, or their Children; for that the King may not by himself or Justices determine Causes wherein himself is actor. And to sum up all, it seemeth a Court made to rise and stoop according to occasion.

The manner of debate was concluded by Vote, and the sum taken in the gross by noise; like to the *Lacedemonians*, who determined what was proposed *clamore non calculis*; yet when the noise was doubtful, they took the votes severally. The meeting of the *Saxons* at this Assembly in the first times was certain, viz. at the new and full Moon. But Religion changing, other things

† Note, at this Time the King might do wrong, &c. and so say *Bracon* and *Fleta* of Kings in their Time.

An. 1158.

things changed these times to the Feasts of *Easter*, *Pentecost*, and the *Nativity*; at which times they used to present themselves before the King at his Court, for the honour of his person, and to consult and provide for the affairs of his kingdom; and at such times Kings used to make shew of themselves in their greatest pomp, crowned with their Royal Crown. This custom continued till the times of *Henry* the second, who at *Worcester* upon the day of the *Nativity* offered his Crown upon the Altar, and so the Ceremony ceased.

Concil. Brit.

p. 127.

Ll. Canut.

p. 2. cap. 79.

Ll. Edw. c. 35.

This grand Assembly thus constituted was holden *sacred*; and all the Members, or that had occasion therein, were under the *Publick Faith* both in going and coming, unless the party were *fur probatus*. If a Member were wronged, the Delinquent paid double damages, and fine to the King, by a Law made by *Ethelbert* above a Thousand years ago. This privilege of *Safe pass* being thus ancient and fundamental, and not by any Law taken away, resteth still in force. But how far it belongeth to such as are no Members, and have affairs nevertheless depending on that Court, I am not able to determine; yet it seemeth that Privilege outreacheth Members: unless we should conceit so wide, that the State did suppose that a Member might be a notorious and known *Thief*.

* i. e. Free-

men.

Tacitus.

Ll. Sax. Lamb.

p. 1.

Concil. Brit.

219.

Ingulfus.

Lastly, this Assembly, though it were called the *Wittagenmote*, or the meeting of *wise men*, yet all * that would come might be present, and interpose their liking or disliking of the Proposition, *si displicuit sententia fremitu aspernatur, si placuit frameas concutiunt*. And some hints I meet with, that this course continued here in *England*; for some Precedents run, in *magna servorum Dei frequentia*; and that of *Ina*, *commune concilium seniorum, & populorum totius Regni*, in another Council by him holden. The Council of *Winton*, An. 855, is said to be in the presence of the great men, *aliorumque fidelium infinita multitudo*: and it will appear that it continued thus after the *Norman* times. What power the *vulgar* had to controul the Vote of the *wise men*, I find not; *fremitu aspernabantur*, it is said, and probably it was a touch of the rudeness of those times; for it was not from any positive Law of the Nation, but a fundamental Law in Nature, that *wise men* should make Laws; and that the supreme Judicature should rest in the *Wittagenmote*, was never an honour bestowed upon it by the *Saxons*, but an endowment from the light of Reason; which can never be taken away from them by that headless conceit *provoco ad populum*, but that Body must be as monstrous as the *Anthropophagi*, whose heads are too nigh their belly to be wise †.

C H A P. XXI.

Of the Council of Lords.

THIS in the first condition was a meeting only of *Lords*, for direction in emergent cases, concerning the government and good of the Commonwealth, and for the promoting of administration of Justice; these the Historian calls *Minora*, because they were to serve only the present passions of State. Afterwards, when they had gotten a King into their number, they had so much the more work as might concern due correspondency between him and the people, and of themselves towards both.

This

† And yet by *Tacitus* it seems, That the Princes could not determine of Matters of State without the Consent of the Commons; as, *de Majoribus omnes consultant*, and *Quod omnes tangit ab omnibus tractetur*.

This work was not small, especially in those times of the growth of Kings, but much greater by the access of *Prelates* into their number; with whom came also a glut of Church-affairs, that continually increased according as the Prelates ambition swelled; so as this Council might seem to rule the Church alone in those days: whenas few motions that any way concerned Church-men, but were resolved into the *Prelatical cognizance*, as the *minora Ecclesiæ*. And thus under the colour of the *minora Ecclesiæ*, and the *minora Reipublicæ*, this mixt Council of Lords came by degrees to intermeddle too far in the *magnalia Regni*. For by this means the worshipping of Images and the Mass was obtruded upon the Saxons by the Roman Bishop and his Legate, and the Archbishop of Canterbury; and decreed, *That no Temporal or Lay-person shall possess any Ecclesiastical possessions. That elections of Ecclesiastical Persons and Officers shall be by Bishops. That the possessions of Church-men shall be free from all Lay-service and Taxes.* And in one sum, they did any thing that bound not the whole body of the *Free-men*. In which had these Lords reflected more upon the office, and less upon the person, and not at all upon their private interest, they doubtless had been a blessing to their Generations, and a Golden Scepter in the hand of a righteous King: But contrarily missing their way, they became a Sword in the King's hand against the Subjects, a Snare to the Kingdom; and, had not the *Wittagemote* in their meeting allayed those distempers, the Saxon government had been little other than a Commonwealth reversed.

Mag. cent. 8.
cap. 9.
An. 712.
Concil. Brit.
p. 189.
An. 694.

C H A P. XXII.

Of the Manner of the Saxons Government in time of War.

AS the Condition of States or Kingdoms is diversly considered in War and Peace, so also must their Government be: For however War in itself be but a feverish Distemper in a Commonwealth, yet in some cases it is as necessary, as a kindly Ague in due season is for the preservation of the Body; which many times takes distemper rather from the excellency of its constitution, than from the abundance of humours. Nor did the temper of the Saxon Commonwealth ever shine more than in War, while it set a Law upon that which ordinarily is master of all mis-rule and confusion, and so fought by rule rather than by passion. Their Chief in the first times was chosen by the *Free-men* in the Field, either at the *Wittagemote* or the *Folknote*, according to the extent of his command; being carried upon a Shield borne upon their shoulders, like as now Knights of the Shire are. This Emblem they entertained him with, to declare their trust in him, and the work that was expected from him. His first title was *Heretock*, afterwards he was called *Duke* or *Dux*; the latter whereof turned to a bare Title in the conclusion, but the former maintained its own honour so long as the name lasted. After his election, all swore to be at his order, and not to forsake him. This was a trick of imbasd times: for tho' the *Lacedemonian* Law was positive, that none should flie or break his Rank, but get the Victory or die; yet were they neither bound by Oath or Penalty; shame in those times being accounted worse than death by those brave minds. But times growing more old, grew also more base-spirited, and men could not (drawn into the field) be holden in Rank by Oaths or Honour; and this occasioned that

Tacitus:
Ll. Ed. c. 35.

Tacitus.

Lk Sax. Lamb.
Cantab. 10.
Concil. Brit.
p. 528.
An. 1009.

Tacitus.

LI. Ed. c. 35.

LI. Canut.
c. 58.

that Law of *Ina* the Saxon King, that in such case a Country-Gentleman should be fined one hundred and twenty shillings if he were landed; but if otherwise, sixty shillings, and the Yeomen thirty shillings; and afterwards the penalty was increased to the forfeiture of all the estate of the Delinquent. In their Wars they went forth by bodies collectively, as they were united by the law of pledges; this made them stick close together for the honour of their Families and Friends, and rendered their encounters mortal, and to the worsted party commonly fatal: for once beaten in the field, they could hardly recover either by rallying or gathering a new Army. Probable it is that the Lords might have their *Villains* to follow them in the Battle, but the strength consisted of the *Freemen*; and though many were bound by *tenure* to follow their Lords to the Wars, and many were *Voluntiers*, yet it seems all were bound upon call under peril of Fine, and were bound to keep Arms for the preservation of the Kingdom, their Lords, and their own persons; and these they might neither pawn nor sell, but leave them to descend to their Heirs, and in default of them, to their Lord, and in default of him, to their chief pledge, and for want of such to the King. They mustered their Arms once every year both in Towns and Hundreds, viz. the morrow after *Candlemas*; and such whose bodies were unfit for service, were to find sufficient men for service in their stead. They were strict in their Discipline, if they follow their rule, which was made not by the arbitry of the General, but by Parliament. These, amongst other scattered principles concerning Sea-affairs, may serve to let us know that the *Law-martial*, and that of the *Sea*, were branches of the positive Laws of the Kingdom, settled by the general Vote in the *Wittagenmote*, and not left to the will of a lawless General or Commander; so tender and uniform were those times both in their Laws and Liberties.

C H A P. XXIII.

Of the Government of the Saxon Kingdom in times of Peace; and first of the division of the Kingdom into Shires, and their Officers.

* The ancient Britons had also the like Divisions called *Comitatus*. See LI. Hæli, p. 4.

Seld. Tit. Hon.

M. West. An. 794.

IF the Saxon Government was regular in time of War, how much rather in time of peace! All great works are done by parcels and degrees; and it was the Saxons ancient way in *Germany*, to divide their Territory into several Circuits or Circles, and to assign to each their several Magistrates, all of them ruled by one Law; like one soul working in several Members to one common good. Thus they did here in *England*, having found the Land already divided * into several Governments, they likewise, what they conquered, divided into several parts called *Comitatus*, or Counties, from the word *Comes*, that signifies a Companion; and the Counties thence called, are nothing but Societies or Associations in publick charge and service. But the Saxon word is *Shire* or *Sbare*, that is, a portion or precinct of ground belonging to this or that Person, or great Town, and bearing the name of that Person or Town, and sometimes of the situation of the people, as *North* or *South Folk*, *East* or *South Sex* or *Saxons*. This division by the names seems to be of Saxon original; and though by the testimony of *Ingulfus* and other Writers, it might seem to be done by *Alfred*; yet it will appear to be more ancient, if the Reader mind the grant of *Peter-pence* made by King *Offa*, wherein is recorded the several Diocesses and Shires out of which that grant was made, under the very same names that they own at this day; and that grant was more ancient than *Alfred's* time by the space of eighty years. Each

Each of these *Shires* or *Counties* had their two chief Governours for distributive justice; of these the *Sheriff* was the more ancient and worthy Officer, being the Lieutenant, and aided by the power of the County in certain cases: for his Commission extended not to levy war, but to maintain Justice in that County, and within the same; and in this work, he was partly ministerial, and partly judicial: in the one he was the King's Servant to execute his Writs; in the other he regulated the Courts of Justice under his Survey. He was chosen in the County-Court called the *Folk-mote*, by the Votes of the *Freeholders*; and as the King himself, and the *Heretock*, were intitled to their honour by the people's favour.

2. The *Coroner* †, though in original later, was nevertheless very ancient; he was the more Servant or Officer to the King, of the two. His work was to enquire upon view of Manslaughter, and by Indictment of all Felonies as done *contra Coronam*, which formerly were only *contra Pacem*, and triable only by appeal. And also he was to enquire of all Escheats and Forfeitures, and them to seize. He was also to receive appeals of Felonies, and to keep the rolls of the Crown-pleas within the County. It's evident he was an Officer in *Alfred's* time; for that King put a Judge to death, for sentencing one to suffer death upon the *Coroner's* record, without allowing the Delinquent liberty of Traverse. This Officer also was made by election of the *Freeholders* in their County-Court, as the *Sheriff* was, and from amongst the men of chiefest rank in the County, and sworn in their presence, but the King's Writ led the work ||.

C H A P. XXIV.

Of the County-Court, and the Sheriff's Torne.

THE Government of the County in time of peace, consisted much in the administration of Justice, which was done in the publick meetings of the *Freeholders*; and their meetings were either in one place, or in several parts of the County: in each of which the Sheriff had the managing of the Acts done there. The meeting of the *Free-men* in one place was called the *Folk-mote* ‡ by the Saxons (saving the judgment of the honourable Reporter, *Coke Instit.* 2. p. 69.) and of latter times the *County-Court*: the work wherein, was partly for consultation and direction concerning the ordering of the County, for the safety and peace thereof; such as were redress of Grievances, election of Officers, prevention of Dangers, &c. and partly it was judicial, in hearing and determining the common Pleas of the County, the Church-affairs, and some trespasses done therein; but not matters criminal, for the Bishop was Judge therein, together with the *Sheriff*; tho' by the Canon he was not to intermeddle in matters of Blood; yet neither was the Bishop's nor Sheriff's work in that Court, other than directory or declaratory; for the *Free-men* were Judges of the fact, and the other did but *edocere jura populo*; yet in special cases upon petition, a Commission issued forth from the King to certain Judges of *Oyer* to join with the others in the hearing and determining of such particular cases. But in case of injustice or error, the party grieved had liberty

G

of

† The Name *Crowner* seems *British*, and to import one appointed to view dead Bodies.

|| Note, in the *Saxon Times*, it seems, That no Man could exercise any Office, either Civil, Military or Ecclesiastical, without his Election thereto by the *Folk-mote*. Vid. *Boban's Lex Parl.* p. 22. to 26, &c. And this Right of Election continued even after the supposed Conquest. Vid. *ib. Sax. Chron.* 171, and *post*, chap. 46.

‡ This Assembly was a County *Parliament*. See *Mat. Paris* sub Anno 1025, and *Boban's Lex Parl.* 19, 20.

Ll. Canut.
Ll. Edgar.

Concil. Brit.
p. 197. tit. 22.
Ll. Edw. c.
35.

Ll. Ed. c. 35.
i. e. By ma-
king new
Laws if need-
ful.

Ll. Edw. c. 4.
Sberiff's Torne.

Mirror. c. 1.
Sect. 16.
Ll. Edgar.

cap. 5.
Ll. Edw. cap.
35.
Ll. Canut. p.
a. cap. 17.

of *appeal* to the King's Justice. Nor did the Common Pleas originally commence in the County-Court, unless the parties dwelt in several Liberties or Hundreds in the same County; and in case any mistake were in the commencing of Suits in that Court, which ought not to be upon complaint, the King's Writ reduced it to its proper place; and in this also the King's own Court had no preheminance. In those ancient times this *County-Court* was to be holden but twice a year, by the constitution of King *Edgar*, but upon urgent emergencies oftner; and that either by the King's special Writ, or if the emergent occasions were sudden and important, by extraordinary summons of ringing the Moot-bells. Unto this Court all the *Free-men* of the County assembled to learn the Law, to administer Justice, to provide remedy for publick inconvenience*, and to do their fealty to the King before the Bishop and the Sheriff upon Oath; and in the work of administering Justice, causes concerning the Church must have the precedency; so that as yet the Canon-Law had not gotten footing in *England*.

The other Court wherein the Sheriff had the directory, was in the meeting of the *Free-men* in several parts of the County; and this was anciently, and now is called the *Sheriff's Torne*; which simply considered, is but a *Hundred-Court*, or the Sheriff's *Torne* to keep the Hundred Court. It was ordered to be kept twice every year, viz. at the *Lady-day* and *Michaelmas* †, or soon after. Unto this Court all the *Freeholders* of the Hundred repaired, and there they, the *Bishop* and *Sheriff*, executed the same power and work for kind, that they did in the *County-Court*. In this Court all the Suits in the Hundred-Court depending, had their determination, and others had their commencement and proceedings, as well the Pleas of the Crown as others. Some had conceived it to be a *County-Court*, or superiour thereto; but there being no ground thereof I conceive it to be no other than a Visitation of the County by parcels or in circuit.

C H A P. XXV.

Of the Division of the County into Hundreds, and the Officers and Court thereto belonging.

COUNTIES were too great to meet upon every occasion; and every occasion too mean to put the whole County to that charge and trouble: and this induced sub-divisions; the first whereof is that of the *Hundred*, now, and also anciently so called; but as ancient (if not more) is the name *Pagus*; for the Historian tells us, that the *Germans*, in the executing of their Laws, a *hundred* of the *Free-men* joined with the chief Lord *per pagos vicofque*, and in raising of Forces one hundred were selected *ex singulis Pagis*, which first were called *Centenarii*, or *Hundreders*, from their number; but used for a title of Honour, like the *Triarii*. And as a second hereunto I shall add that testimony of the Council of *Berkhamstead*, which speaking of the reduction of Suits from the King's Court *ad pagi vel loci, præpositum*; in other places it is rendred, *to the Governors of the Hundred or Burrough*. And at this day in *Germany*, their Country is divided into Circuits, called *Centen* or *Canton*, and *Centengrieht*; and the *Hundreders* they call *Centgraven*, or *Hundred-Chieffs*, whether

* Note, by the Confessor's Laws, c. 35 and 36, it appears, That the *Folk-mote* or *County-Court* was to assemble twice yearly at stated Times, viz. the Calends of *May*, and the Calends of *October*; and so needed not the King's Writ to call them. But the *Sheriff's Torne* being originally, till restrained, held *ad Libitum Vic.* a Summons of the Sheriff was necessary, and so was the King's Writ, when an extraordinary *Folk-mote* was to be assembled; but not ordinarily, *Ratæ patet*.

ther for Government in time of peace, or for Command in time of War; the latter whereof, the word *Wapentake* doth not a little favour. Amongst these, one was (*per eminentiam*) called the *Centgrave* or *Lord of the Hundred*, and thereunto elected by the *Free-men* of that Hundred, and unto whom they granted a stipend in the nature of a Rent, called *Hundredsettena*, together with the government of the same, Malmsh. Reg. p. 54. The division of the County in this manner was done by the *Free-men* of the County, who are the sole Judges thereof, if *Polydore's* testimony may be admitted; and it may seem most likely that they ruled their division at the first, according to the multitude of the Inhabitants; which did occasion the great inequality of the *Hundreds* to this day. The Government of the *Hundred* rested at the first upon the Lord and *Hundreders*; but afterwards by *Alfred* they were found inconvenient, because of the multitude, and reduced to the Lord or his Baliff, and twelve of the Hundred; and these twelve were to be sworn, neither to condemn the Innocent, nor acquit the Nocent. This was the *Hundred-Court*, which by the Law was to be holden once every Month; and it was a mixt Court of Common-pleas and Crown-pleas: for the *Saxon* Laws order, that in it there should be done Justice to Thieves; and the trial in divers cases in that Court is by *Ordeale*. Their Common-pleas were cases of a middle nature, as well concerning *Ecclesiastical* persons and things as *secular*; for the greater matters were by Commission, or the King's Writ, removed, as I formerly observed: All *Free-bolders* were bound to present themselves hereat. And no sooner did the Defendant appear, but he answered the matter charged against him, and judgment passed before the Court adjourned; except in cases where immediate proof was not to be had, albeit it was holden unreasonable in those days to hold so hasty process: and therefore the Archbishop of *York* prefers the *Ecclesiastical* or Canonical way before this. Lastly, in their meeting, as well at the *Hundred* as *County Court*, they retained their ancient way of coming *Armed*.

Claver. lib. 1. cap. 19.

Malmsh.

Reg. p. 54.

Li. Alured.

cap. 4.

Li. Edw. 35.

Li. Ætheldr. 1.

Li. Æthelf.

20.

Li. Edw. cap.

37.

Li. Ætheldr.

cap. 1.

Lindenbrog.

Li. Allem. &

Saxon.

Concil Brit.

p. 273.

Glossar. 155.

Tacitus.

C H A P. XXVI.

Of the Division of the Hundreds into Decennaries.

THIS was the last subdivision of the County, and that rested upon the persons; and it was either not at all, or not so observeable, as to be worthy of the *Roman* story; and therefore may rather be thought an extract from *Moses* Law, introduced by *Alfred* or his direction. I say, this rested on the persons, and not upon the place; for though the *Centeners* were comprehended within certain bounds, yet the *Decenners* were not limited but only within the limits of the *Hundred*. And of these also, it appeareth to me there were divers sorts; for such matters of controversy that did arise amongst the *Decenners*, if of greater moment, were referred to the *Chieffer Justices**, which were appointed *super decem decanes*, which I conceive were *ten chief pledges*; and these might bear the names of the *Centeners*, although they be not the *Centgraven*: and the rather I incline thereto, because in all probability there must needs be above one hundred *Free-bolders* in *Hundred*; and all *Free-men* were *Decenners*, that is, ranked into several *tens*; each one being *pledge* for others good abearing, and in case of default, to answer it before the Judge†, and in case of default of appearance, his nine pledges should have

*These I take to be the chief *Hundreders*, and the Appeal lay from the *Decennary* or *Tubing* to the *Hundred-Court*.

Li. Canut. c.

19.

†i.e. of

one the Hundred.

one and thirty days to bring the Delinquent forth to justice. If this failed, then the chief of those *Decenners* by the votes of that and the Neighbour *Decennaries*, was to purge himself and his fellow-pledges, both of the guilt of the fact, and of being parties to the flight of the Delinquent. And if they could not this do, then were they by their own Oaths to acquit themselves, and to bind themselves to bring the Delinquent to justice as soon as they could; and in the mean time, to pay the damage out of the Estate of the Delinquent; and if that were not sufficient, then out of their own Estate; but if the Delinquent's Estate was sufficient, the surplussage thereof remained with the pledges. And lastly, the Master of the Family was a *pledge* for his whole Family. This was the Law of *Decenners*, and may seem to be somewhat a rigorous Law, not only in case of Delinquency, but also for their abode; for none of them might depart from their dwelling without consent of his fellow-pledges*, nor out of the County without allowance of the Sheriff, or other Governor of the same. And if any controversy arose between the pledges, the chief pledge by them chosen, called also the *Dean* or *Headborough*, might determine the same; but this held only in matters of lighter consequence.

Ll. Edw. cap.

15.

Ll. Canut. c.

28.

Ll. Alured.

cap. 33.

Ll. Canut. p.

2. cap. 15.

Ll. Edw. cap.

20.

C H A P. XXVII.

Of *Franchises*: and first of the *Church-Franchises*.

WE have hitherto trod in the road-way of the Government of the Commonwealth; but private regards have made by-paths, which we must trace, or else the footsteps in many particulars will remain unknown. These are called *Exemptions*, but more ordinarily *Franchises*, from which scarce any part of the Kingdom remained free; and are to be considered, either in regard of the place or person. In the latter I intend that of the Church-men, whose Persons and Estates, in many particulars, were exempted from the civil power of this Kingdom. Their persons devoted to a peculiar work, they would have to be under a peculiar Law, called the *Canon-Law*, which at the first extended only to their own persons, and that only *pro reformatione morum*: for so an Archbishop tells us, and it did teach *quomodo Canonici, id est, regulares Clerici vivere debent*; but when it grew to its full charge, it gave a louder report, *Quicumque aliquid tenuerit, vel in fundo Ecclesie mansionem habuerit, extra curiam Ecclesiasticam non placitabit quamvis foris fecerit*. And thus as Church-ground increased by the blind charity of those times, so long Church-men multiplied, and the Canon enlarged from the persons of *Regulars* to all Clergymen, and from them to their Tenants and Neighbours; from thence to certain Spiritual or Ecclesiastical crimes or scandals, wherever they were found; and wherever it touched, it took and bound by *Excommunication*, and upon *significavit*, being first delivered to *Satan*, they delivered him over to the Sentence of the Law, to be imprisoned. If the offender be out of reach by the space of thirty and one days, he is *Outlawed*; so as there is no way left to escape the Church-fury.

Concil. Brit.

p. 258.

Ll. Edw.

Conf.

Ll. Edw. c. 7.

* Nor could he make any Bargain or Contract, or buy or sell to the value of Four-pence, without their Consent, they being all Pledges for each other; so that no Debt could be lost or Contract unperformed without Satisfaction.

C H A P. XXVIII.

Of the second Franchises, called the Marches.

F*Rankises* of the place, were such as were limited within precincts of place, and annexed thereto; and of this sort first were those of the borders, of which those are the most ancient that bordered the *Britons*, now called the *Marches of Wales*, in which was a peculiar Government so far as concerned administration of justice; for otherwise the subjects each of them submitted themselves to the service of their own Prince. This was therefore a third, different, and mixt Government, agreed upon jointly between the *Britons* and *Saxons**, who after a long and burdensome War, (wherein both peoples were well wearied) by degrees became Friends, entered Traffick, and into the strictest Societies by Marriage. Thus finding the sweetness of peace they provide against future occasions of strife that might arise in commerce by the juggling of two Laws together; and agree in one Law, and upon a certain number of Judges elected by common consent, who were to see to the execution of these Laws as joint *Assessors*. From these, as I conceive, arose those which are now called the *Lords Marchers*, and were at the first twelve in number, viz. six *Saxons*, and six *Britons*. It seemed this form of Government was first instituted by *Ætheldred*, and by way of prescription or custom, continueth till this day: and as it was the birth of truce, so for the future became both Mother and Nurse of peace between those two peoples, like the twilight between the day and night, until both were brought under one head, and by divine providence settled in a lasting day.

Ll. Ætheld.
cap. 3.

C H A P. XXIX.

Of County-Palatines.

OF the same sort of *Franchises* were these which are called *County-Palatines*, which were certain parcels of the Kingdom assigned to some particular person, and their Successors, with Royal power therein to execute all Laws established, in nature of a Province holden of the Imperial Crown: and therefore the King's Writ passed not within this precinct, no more than in the *Marches*. These were occasioned from the courage of the Inhabitants that stoutly defended their Liberties against the usurping power of those greater Kings that endeavoured to have the Dominion over the whole *Heptarchy*, and not being easily overcome, were admitted into composition of *Tributaries*; and therefore are found very ancient: for *Alfred* put one of his Judges to death for passing Sentence upon a Malefactor, for an offence done in a place where *the King's Writ passed not*; and the same author reciting another example of his justice against another of his Justices for putting one to death without precedent, rendereth the King's reason, *for that the King and his Commissioners ought to determine such cases, excepting those Lords in whose precinct the King's Writ passeth not*.

Mirror. cap. 5.
Sec. 1.

* This Agreement between the *Britons* and *Saxons* was very much promoted by King *Ina*. See *Ll. Ina*. c. 22, 31, 32, 47, &c.

Of Franchises of the Person.

F*rancheſes of the Perſon* are ſuch Liberties annexed unto the Perſon, as are not
 absolute Lordſhips, but only tending thereto: and limited within a Precinct,
 but not annexed thereto: and theſe are matters of profit rather than power; as
 thoſe of *Bury St. Edmonds, Doncaſter, Dorcheſter, Circeſter*; all which were in
 the *Saxon* times: and theſe or ſome of them had juridical power in caſes of Felonies
 and Robberies ariſing within that precinct, ſo as the Delinquent was both Inhabitant
 and taken within the ſame; this was called *Infangtheoff*: and if upon freſh purſuit
 made by the right owner or poſſeſſor, the Delinquent was taken with the prey in
 his poſſeſſion, or as the old Dialect is, *Handhabend Backbearend*; then was he car-
 ried immediately before the *Coroner* of that Liberty, and the *Sakeber*, or party wrong-
 ed, made his proof by Witneſſes; and thereupon judgment forthwith paſſed with-
 out answer, and execution immediately enſued. Some Liberties had *Outfangtheoff*,
 that is, the trial and forfeiture of ſuch Delinquents, being no Inhabitants, and yet
 taken within the Liberty; or Inhabitants, and not taken within the Liberties:
 but this Trial was always by Jury. The Antiquity of theſe Liberties are not
 obſcurely manifested in their names, and more clearly by the *Saxon* Laws
 and Acts; for it's obſerved of *Alfred*, that he ſeized a *Franches* of *Infang-*
theoff, becauſe the Lord of that *Franches* would not ſend a Felon (taken with-
 in his Liberty for a Felony committed without the ſame) to the Goale of the Coun-
 ty, as he ought to have done. Other Liberties there were granted alſo by Charter;
 a liſte whereof may be ſeen in one Grant made by King *Edgar*, to the Monastery
 of *Glaſtenbury*, wherein was granted *Sack, Hamſockne, Friderbrece, Forſtel, Teme,*
Flemone Ferdre, Hundred Setene, Sock, Tboll, Adæ, Horda, Buſan Orderan, Bene
Orderan; the particular natures of each may be obſerved in the Gloſſaries; all of
 them being allowed to the Crown by the Law, and by the advice of the Council of
 Lords granted over to theſe Grantees in nature of Deputies to the King, to poſſeſs
 both the power and profit thereto belonging.

Miror. cap. 5.

Infangtheoff.
Li. Edw.
cap. 26.Outfangtheoff.
Bracton. lib.
3. tract. 2.
cap. 35. Bri-
ton. cap. 15.
Li. Edw.
cap. 21.
Miror. cap. 5.
dec. 1.

C H A P. XXXI.

Of Manors.

Nevertheleſs, moſt of theſe Liberties, if not all of them, were many times
 granted by Kings as appendant to *Manors*; which were *Franchises* of ſmaller
 circuit, being at the firſt portions of ground granted to ſome particular perſons,
 and by them ſubdivided and granted over to particular perſons to hold of the
 Grantors by Rents, Services, and ſuit to one Court; all being no other
 than the ſpoils of War, and rewards of valour, or other ſervice. Theſe in
 their collective nature are called a *Manor*, and by continuance of time become a
 kind of body politick. In Antiquity it is called *Manſum*, from the Manſion-houſe,
 altho' it is not of the Eſſence of a *Manor*, nor ought the words of *Bracton*
 to

to be construed according to the literal sense; for the House may be destroyed, and yet the *Manor* continue; and the ground was granted in tenure before any house built thereupon. The quantity of the ground thus given to hold by service, was according to the pleasure of the Lord more or less, and therefore might extend into divers *Parishes*; as on the other part, one Town might comprehend divers *Manors*. The Estate that was granted, depended partly on the condition of the *Grant*: for some were *Servi* or *Bondmen*, and their Estate was altogether at the will of the Lord, as was also the benefit; but the Servants merit, and the Lords benignity concurring with some Conscience of Religion, as the light grew more clear, abated the rigour of the tenure into that which we now call *Copy-hold*. Other Estates were made to the *Free-men*, which in the first times were only for years; albeit therein they were not niggardly, for they stick not at Leases for a hundred years, yet with a render of Rent, which in those days was of Corn or other Victual, and thence the Leases so made were called *Feormes* or *Farmes*, which word signifieth Victuals. But times ensuing, turned the Victual into Money, and terms of years to terms of life and inheritance, retaining the *Rents*, and those were called *Quit-rents*, or Rents of those persons that are *acquitted or free*. But in case of estates of inheritance for the most part after the death of the Tenants were reserved *Heriots* or a *relief*: which were not left to the will of the Lord, but was put in certainty, in the very letter of the Law: for according to each man's degree, such was his *Relief* or *Heriot*.

But over and above all, they reserved special service to be done by the person of the Tenant, or some other by his procurement, of which those that were their *servi* or *villains*, were at the will of the Lord: others had their particular service set down in their grants. These concerned either War or Peace; the former was afterward called the service of the *Knight* or *Soldier*; the latter the service of the *Husbandman* or *Plough*. That of the *Soldier* was the more honourable, and suitable to the old *German* trade: *Pigrum & iners videtur sudore acquirere quod possit sanguine parare*: and the work was to defend the Kingdom, the Lords Person and Honour; and to this end he was ever to have his weapons in readiness, which gave name to the *service*, altered as times and customs changed. This *service*, by custom, from a work degenerated into the bare Title, and became a dignity: and the men named, or rather intituled *Milites*; and many of the *Saxon* Charters were attested by men bearing that Title; yet the service itself was far more ancient, and called *servicium lorice*; of which sort also were the *Custodes pagani* that wore a Helmet, a Coat of Mail and a gilt Sword: not unlike the old *German* way of calling forth of their *Tirones*, to the war. Of this rank some were more eminent than others: for some bare the single title of Knight, and it seemed, served on foot; others served on horseback, and were called *Rad-knights*, or *Knights-riders*, as *Bracton* noteth; and these I take to be the *Vavafours*, noted in the Conqueror's Laws: for that their *relief* is a Helmet, a Coat of Mail, a Shield, a Spear, and a Horse. Now for the maintaining of this service, they had Lands and Tenements called *Knights-Fees*, which bound the owner to that *Service* into whose hands soever they came, to be done either by the Person of the owner, or other fit person by him procured, and therefore were discharged from the payment of all Taxes and Tollage, which was the Law of the *Goths* of old, and remains in *Sweden* at this day. The

Bracton.
fol. 212.

Townships.

Gran-Fleta, lib. 4.

cap. 15.

Ingulfus
Croyl.

Gloss. 158.

Li. Saxon. 16.

17. Lamb.

Gloss. 348.

Li. Canut. p.

1. cap. 69.

Knights serv-
vice.

Tacit.

Tacitus.

Selden. Spicil:

Co. Littlety.

num-

number of these *Fees* much increased, so as in the Conqueror's time they were above sixty thousand, which was a mighty body for a small Island, and brought much honour to the Nation.

Socage tenure.

Tacitus.

Co. Littlet.

fol. 86.

Ll. Edw. c.

33.

Spicileg.

Ll. Edw. c.

33.

But the profit arose from beneath, I mean from the *Socage tenure* or service of the Plough, which in the first times was performed by those that were unfit for the service of the Wars, either being green and young, or decrepit and aged; and sometimes by the Women. But after that the *Saxon* Conquest was at a stop, and that no more was to be gotten by Blood, men endeavoured to satisfy their desires by sweat; and turned their Swords into Plough-shares; and thus the Husbandry increased exceedingly, and hath proved the best Pillar of the Common-weal. The nature of this tenure is fully set out by the Reporter; nor can I add thereto more than the Law of the Confessor concerning these men, viz. *That no man might trouble them, but for their Rent, nor any Lord thrust them out of their Farm, so long as they do their service.* And thus it appeareth, that the *Service* became in nature of a condition subsequent, begetting an increaser of the Estate, which by continuance wrought an inheritance, and so the Title of Entry was turned wholly into distresses for service performed; yet the Lord was no loser thereby, so long as *Heriots, Rents, and Services* accrued unto him.

C H A P. XXXII.

Of Courts incident and united unto Manors.

Court-leet.

Mirror. p. 17.

Lind. gloss.

Albin. Hist.

Saxon. p. 72.

F. N. Br. 2.

View of Frank pledge.

BY Grants made by Lords unto Tenants already noted, the Lords had power by common right to call their Tenants before them, and enquire concerning their payment of Rents, and performance of service, which became Courts of constant appointment: of which sort there were two, one for the Free-men, the other for the Bond-men; and this brought forth another *service*, which we call *Suit of Court*. The court of *Free-men* was holden from three weeks to three weeks, where- in the *Free-men* as in the *Hundred* and *County* were Judges of the fact, and from them named, as at this day, *Court-leet*, or the Court of the *Liti*, or such as are manumitted or *Free-men*. In this Court all Actions or Suits between the *Free-men* of the same *Manor*, and within the same arising, were determined; nor could any Court (no not the King's) intermeddle with such Suits before Trial there had; but by the Lord's allowance. And upon this privilege, the Writ of *right Patent* was grounded. But the full nature of this Court is not within my intention, but I must refer the Reader to the Law-books. For it was the least part of the work and power which this Court obtained by continuance of time; in regard that *Manors* exceedingly multiplied so as no part of the Land was left free; and many one of them extended into divers *Decennaries*, the Lords obtained great power over them, and had of King's grants of *View of Frank-pledge* within their several Lordships; and further power of inquiry, and punishing of matters of publick nuisance, and such as were *contra Pacem & Coronam*; which by custom became annexed unto the *Court-leet*. The *nusances* of Copy-holds being done to disherison of the Lord, and not proper for

for the Court of publick inquiry. The Judge of this *Court-leet* was the Lord, or his Steward, for the directory part; and the Steward was properly *Coroner* within the *Manor* to take Presentments, and certify them to the *Coroner* of the County. And thus this Court swallowed up much of the power of the *Decenners* Court in the very infancy, so as we find no foot-steps of any writ of Right to the *Decenners*, or Chief-pledges; but contrariwise many Views of Frank-pledge granted to particular persons in the time of *Alfred*: and many things done by the *Chief-pledges* in the Courts of these *Manors*, as is to be yet seen in many ancient Court-Rolls. Miror. cap. 5. Sec. 1.

The other Court, which by common Right belonged to the Lords of *Manors*, was that of the Copy-holders, called or rather included under the name of the *Court-Baron*; which albeit it is called in the ordinary stile *Curia Baronum*, yet not so properly, as I conceive; and it may be by way of mistake for *Barons*: For if it were so properly united formerly to the Court of *Freemen*, as (*ab excellentiori*) it always passed under that name, yet when that court is omitted, and slipt out of the way, the Court of *Copy-holders* that remaineth, improperly retaineth the name of that which is gone. This Court at the first was intended only for the Lord's benefit, and for the Tenant's right, as subservient thereunto. I say, the Tenant's right, not against their Lord; for they had no right against him: but against any other they had protection of Law, both for themselves and their Estates. And as I said before, by custom, or rather light of Religion, their Persons and Estates were considerable, even by the Lords themselves. Which also caused a Law to be made, *ut sic de suis hominibus agant, quatenus erga Deum reatum non incurrant, & Regem non offendant*. Which Law could never be intended of the *Freeholders*; for it had been a vain redundancy to have made an especial Law for that, which was provided for by the known fundamental Law of the Kingdom, against which a speedy remedy lay by the King's Writ. And these men, how mean soever, had even in those days a kind of *Property* both in Lands and Goods: for the Laws, though by their antique Language darkned, yet plainly speak *de terra sua & catallis ejus*. And if the ancient *Germans* were so generous to their *Bondmen*, surely much rather, after their coming into this Island; inasmuch as their service was more and more necessary in *Agriculture*, which could never be performed by the Natives, who were not in their own persons conquered, although their Land was. Court-Baron. Co. Inst. cap. 57. Selden. Spicil: 184. cap. 33.

C H A P. XXXIII.

Of Townships and their Markets.

THE next *Franchese* is that of Towns: This was taken up as a Birth of War and Nurse of Peace; for their Ancestors liked not to dwell in crouds, *ne patiquidem inter se junctas sedes*: it being their Trade or pastime to war upon Beasts, when they found no Enemies amongst them. This solitudinary custom could not be soon shaken off, and might well occasion multitudes of Towns in those times (though small ones doubtless) that Writers speak of; if true it be, that after the wasting times of the *Danes* and *Normans*, in the Conqueror's time, were found in *England*, Forty-five thousand Parishes, and Sixty-two thousand Villages. Tacitus.

Villages. Nor was Peace less beneficial to them, than they careful of it; for by continuance of Peace, Husbandry, Manufactures, and Commerce, occasioned people to gather to places commodious for Habitation, in good Soil, nigh Navigable Rivers or Havens; and according to their situation and trade, so they swelled in multitude or decayed. Some of whom growing more eminent than others, more care was had of their government and safety; for the latter, by building of Walls and Castles, and for the former by settling a Magistracy peculiar to that Place or Township; not as so many *Decenners*, but as one body consisting of many members. And thus by custom they grew to be *Fraternities*, or *Corporations*, under one Magistrate or Head, whom they called *Alderman*; and held a Court of justice (at the first holden twice a year) which was in nature of a *Leet*, with a view of Frank-pledge, as

Il. Canut. c. 44. may appear in the cases of *Dorchester*, *Circester*, and *Doncaster*, in *Alfred's* time; and herewith they had publick Markets, which served them for their better conveniencies.

Markets.

This privilege of *Market* was a liberty of publick sale and trade in Commodities that principally concern the Belly; but by common course became a pass for Commodities of every kind almost. Concerning this liberty, I shall desire leave to interpose this Parenthesis ensuing, before I proceed in the intended discourse.

In the first times, as every man by common right had property in his own Goods, so by the same right he had power to alien them to any person, at any time, in any place, by gift, sale, exchange, or otherways; and that by such Alienation, but especially by sale, a right was vested in the Buyer against all men, saving the *Eigne-right*, which was recompensed upon warranty, and recovery in value. And in those days common sense taught men to buy or sell, of or to the next Neighbour that would bargain with them: and for want of such occasion, to repair to the next Assembly, Meeting, or Concourse of people, for the sale of such Commodities as their Neighbourhood would not take off their hands. And thus the greater Towns that had Walls or Castles, became the greatest *Markets*, and others less; and this made the neighbourhood of those Towns to repair thither to buy, as others to sell. But time discovering a double inconveniency herein, viz. that by these less publick sales in smaller Villages, where little or no care of Right or Justice was had (and by which means the word *Pagan* became a word of reproach) many mens Goods by clandestine Contracts were lost, and no care had of their recovery; and (which was yet more prejudicial to the Publick) that the greater Towns appointed for the strength and defence of the Kingdom, became ill provided with supply of Victuals, either for the present or future; and what was had, for the most part was gotten at the second hand, and higher rate than the Country Villages had: The wise men, by publick Edict, laid a restraint of *Markets* in smaller Villages, and more private places; and thus the greater Towns having *Markets* formerly, became more publick *Markets*, not by any new Right or Privilege from the Crown; for it neither had such power nor could have (but upon usurpation) against the common Right of such Towns and Places of publick defence. This Restraint, upon the reasons aforesaid, was made first in the *Saxon* times, as may appear by their Laws but more clearly declared and confirmed afterwards by the Laws of the *Normans*, which never gave any new Right of *Market-overt* unto those places of publick defence, but only did inhibit the same in the smaller Villages and private places. In which respect, although the Kings of this Nation in future times took leave to

to abolish that Restraint which did lie upon some of those more private places, for certain reasons of State; and so these places became *Markets-overt*, which formerly were none: yet could they never take away that privilege which Nature itself cast upon those greater Towns (being the very Limbs of the Kingdom) without wrong done to the common Right, and the publick Good; nor abridge them of that power, but that they might still use their liberty at times and places within their Precinct, as might best conduce with the benefit of the Inhabitants of those places, even as any particular Freeman may govern his own Estate as him liketh best. And thus upon the whole matter it is to be concluded, that the ancient Burroughs of this Kingdom properly do not hold their liberty of *Market-overt* by Prescription or Charter, but by common Right; and not as a Corporation made by Charter, but as they are a multitude of people anciently gathered together and united, upon whom the strength and wealth of the Kingdom doth or did formerly much more depend, than on any of the smaller Villages and open Towns: even as every Freeman possesseth and useth his proper Inheritance and Estate without particular privilege derived from the Crown: Nor can the King take away the liberty of *Market-overt* from such places, more than he can take away the liberty of buying and selling from any Freeman, to whom the Law alloweth a liberty of ownership. This I submit to the censure of the learned in the Laws, in regard of the different opinions concerning the same.

This liberty of Township thus made, and the Place and People Inhabitants thereof being of such consequence in the publick administration, had for their better support and safety liberty of fortification, and power to charge one another with the maintenance of these Fortifications by an imposition called *Burghbote*; and held their Tenements under a Rent to their Lord or King called *Burgage*, as they were a body aggregate.

Ll. Edw. c. 1.
Ll. Æthelf.
cap. 12.
cap. 13.
Gloss.

C H A P. XXXIV.

Of the Forests *.

* See Wilkins
Ll. Sax. p.
245, 304.
338, 351.
359, 371.
388. 12 Co.
22.

BESIDES other Prerogatives of the *Saxon* Kings, they had also a Franchise for wild Beasts for the Chase, which we commonly call *Forest*, being a precinct of ground neither parcel of the County, nor the Diocess, nor of the Kingdom, but rather appendant thereunto. This favoured of the old *German* sport, but by custom turned from sport to earnest: For although in the first times the *Saxons* were so few, and the Country so spacious, that they might allow the Beasts their Farm as well as themselves their own; People nevertheless so multiplied, as of necessity they must intercommon either with Beasts or Fishes: the latter whereof, however more cleanly, yet the former had the surest footing, and was chosen as the least of two evils, rather than for any likelihood of good Neighbourhood. For as Nature taught Beasts to prey for themselves, so Men to defend their own; and this bred such a feud between Beasts and Men, as that Kings doubting to lose their Game, took in with the weaker, that the world might see the happiness of *England*, where Beasts enjoy their liberty as well as Men. But this was, as it were, by compromise; for it had been very hard to have pleased the *Freemen*,

Ll. Canut. c.
77.

who had liberty of Game within their own ground by common Right, and to preserve the King's liberty of Forest co-incident therewith, had not the King employed on the one side the power of a *Dane* that looked somewhat like a *Conqueror*; and on the other side, that which looked as like to the bounty of a King, in allowing liberty of ownership to men inhabiting within the bounds of the *Forest*, which at the first was set apart only for the King's pleasure: and all his wits to make a Law somewhat short of a full freedom, and yet outreaching that of Bondage, which we since have commended to posterity under the *Forest-Charter* *. And yet for all that, it proved a hard matter for Kings to hunt by Law; and the Law itself is a Yoke somewhat too heavy for a Commonwealth to bear in old age, if self-denying Majesty shall please to take it away.

C H A P. XXXV.

Concerning Judges in Courts of Justice.

Glanvil. lib.
6. c. 6, 7, 8.

Ll. Edw. cap.
16.

Mirror. c. 5.
Sec. 1. & c. 1.
Sec. 3.

THUS far of the several Tribes and Numbers of this Commonwealth, which like so many Conduit-heads, derived the influence of Government through the whole body of this Island; and in every of which, Judiciary power acted it self in all Causes arising within the verge of that Precinct; some of which had more extraordinary trial before the King and his Council of Lords, according as the parties concerned were of greater degree, or the Cause of more publick concernment. Examples hereof are the Cases between the Bishop of *Winchester* and *Leofstin* in *Ætbeldred's* time, and between the two Bishops of *Winchester* and *Durham* in *Edward's* time: But custom made this Court stoop to smaller game in latter times, and to reach at the practice of the *County-Court*, by sending the Kings Writs to remove certain Causes from the cognizance of those rural Judicatories to their sublime determination. And thus became the *Council of Lords* as an Oracle to the whole Nation; and the King among the rest, as the Priest that many times rendered the Answer or the Sentence of that Oracle in his own sense, and had it confirmed to him by an Oath *se judicium rectum in Regno facturum, & justitiam per concilium procerum regni sui tenturum*; so as, though he was first in view, yet the *Council of Lords* was the first in nature, and the *Cynosure* to direct his tongue and actions.

From this Fountain issued also streams of Judicature into all parts by Judges *itinerant* under the King's Commission, to reform errors, punish defaults in the ordinary rural Judicatories, and to dissolve hard and knotty Cases; and these were occasioned at the instance of the party: and *Alfred* (whose birth this was) sent them forth in way of Association with the Sheriff, Lord of the Fee, or other ordinary Magistrate. [So that these Itinerant Court-Judges were at first only associated to the Rural.]

* Note, King *Canute* had granted a Charter *De Forestis*; see *Manwood's Forest-Laws*. Prefat. Q. *Wilkins Sax.* Ll. 245. *Coke's 4 Inst.* 306. and *Pryn super inde.*

CHAP. XXXVI.

Of the Proceedings in Judicature by Indictment, Appeal, Presentment, and Action.

FOR the proceedings in course, the Saxons were wont to begin with matters belonging to the Church, and afterwards to Secular causes; in which if the matters were criminal, the most ancient way of proceeding was by Appeal of the party complaining. But afterwards in cases that concerned Damage, Injury, or Violence done to the Body of a Man or his Estate, the King was found to be therein prejudiced, besides the prejudice immediately done to the Subject: for a Man disabled in Body or Estate, is disabled to serve the King and the Publick; and upon this ground a way was found out to punish the offender by *Indictment*, besides the satisfaction done to the party wronged. The proceedings against such Delinquents were by attachment of the party, who thereupon gave Pledges for his appearance. If the party could not be found, a *fugam fecit* was returned, and that was a conviction in Law; and pursuit was made after the party by *Huy* and *Cry*. If he was thereby taken, the ancient way was that of *Halifax-Law*; but in latter times he was imprisoned, or admitted to Bail if the offences were bailable: and if the party bailed made default, or did not abide the Trial, his Bail suffered as Principal. If no Bail could be procured, the Delinquent was imprisoned till he was legally acquitted; but this imprisonment was only in nature of restraint. If the Delinquent was found upon the *Huy* and *Cry*, and would not yield himself, he was in repute a common Enemy, and (as a *Wolf*) any man might kill him; as the Law was also the same in case of *Utlary*. At the time of trial (if at the King's suit) the Delinquent was indicted in this manner by any party present. *I D. C. do say for the King, that I. S. is defamed by good men; that he upon—day of— &c. into the House and Goods of— did cast fire, and the same did burn: or, (if it were for Bloodshed) with a Sword did strike and wound him in the left arm, and that this was done Feloniously, or, (if the case required) Traiterously: and if I. S. deny the same, I will for the King prove the matter against him, as the King ought to do; that is to say, by Witnesses and Twelve Men. But if the complaint was at the suit of the party, then the Prosecutor sued him upon Appeal, in manner following: I. C. appealeth D. H. bere present; for that E. Father, Brother, Son, or Uncle (according as the case was) to I. C. being in the peace of God, and of our Sovereign Lord the King, at the dwelling house of E. at—&c. the said D. H. upon the—day of—in the—year of—with a Sword made a Wound of two inches long, and six inches deep, in the left pap of the body of the said E. whereof he died; and this was done Feloniously, and of Malice forethought. And if the said D. H. shall deny the same, the said I. C. is ready to prove the same against him by his body, or as a Monk, Woman, or Clerk, beboveth to prove the same; that is, by Champion; for neither Monk, Woman, nor Clerk was by Law to justify by Battle in their own person. The several causes of Appeal and Indictment may be found in the Law-books, to whom I refer the Reader, it not being within the compass of this Discourse to fall upon the particulars. I shall only observe the difference between *Indictments* former and latter, and between them and *Appeals*, viz. that*

Appeals are positive Accusations in the name of the Prosecutor of the fact done by the party appealed; whereas *Indictments* were only a publication or affirmation of the fame of a fact done by the party indicted, and wherein Not guilty pleaded, served only as in nature of a *Quere*, to usher in the votes of the *Freemen* concerning the fact.

Secondly, the difference between former *Indictments* from those in these days, consists in this, that the ancient *Indictments* were in the name of one man; those of the latter sort are in the name of the Jury; and the former were only of a *fame*, the later of the *fact*.

Mirror. cap. 2.
Sec. 23.
Presentment.

A third way of bringing criminal Controversies unto Judgment, concerned only such matters as were of less consequence; and these were introduced by way of *Presentment*, in the name or behalf of the King, in nature of a positive Accusation of one for a Crime, first laid down generally, and then asserted by a particular fact, in this manner: *I say for our Sovereign Lord the King, That H. here is perjured, and hath broken faith against the King; because, whereas H. is or was Chancellor of the King, and was sworn that he would not sell Right, or any remedial Writ to any one: yet upon the — day of — &c. he sold to B. a Writ of Attaint, and would not grant the same under half a Mark.* So as the difference between an *Indictment* and *Presentment* in those days was only in the degree of the Crime for which the party delinquent was accused, and in the manner of conclusion of the *Presentment*, which was without *Averment*.

Mirror. cap. 2.
Sec. 24.
Action.

The last way of Trials concerns such offences that exceed not the nature of *Trespasses* done to a man's Person or his Goods; and this was by way of *Action*, and it was to obtain recompence for Damage sustained. Now because the former were called *Personal Trespasses*, the Process was by attachment of the Person; who thereupon put in *Bail*, or else his *Person* was secured by imprisonment till Trial, and satisfaction made. But in the latter that concerned the *reality*, three Summons went forth first in the *Hundred-Court*; and if default were made, complaint thereof ensued in the *County-Court*, and thence issued forth a *Districgas*; and if the Defendant still persisted in declining his appearance, the *Distress* was forfeited, and a Summons issued upon the Land. If then the Defendant would not appear, or upon appearance would not give *Pledges* to abide Judgment, his whole land was seized for the benefit of the King, of the Lord of the Hundred, and of the Complainant, because he had offended against all three. But if the party appeared in former times, he answered forthwith, and Judgment passed without delay, as hath been said; unless in urgent cases, where the matter was raw; and then it was adjourned, and *Pledges* given by the Defendant to the full value, after the custom of the *Athenians*; and if the Defendant made *Default* at the day, his *Pledges* were forfeited. But in after-times, for better and more advised proceeding, the Defendant was admitted to his *Essoines*; yet with a Proviso, that no *Essoine* should be allowed for above Fifteen days; and this was the direction of King *Alfred*. [But founded on the Laws of the *Britons*, vid. *Ll. Hoeli*.]

Ll. Ætheld.
cap. 20.
Ll. Canut.
c. 10.
Lindenbr.
tit. 36.

Ll. Edgar.
c. 7.

Mirror. cap. 5.
Sec. 1.

Mirror. c. 3.
Sect. 16.

In the answer of the Defendant, he either traversed the matter in fact or confessed and justified, or confessed and submitted. The first put the matter to the judgment of the *Freemen*; the second to the judgment of the *Judge*; the third to the discretion of the *Complainant*, whereby the Defendant generally found mercy, and in case of *Trespass*, rendered less damage. I find no footsteps in those times

times of Dilatory Pleas, or *Demurner*, or other delays, unless in case of *infancy*; for the Saxons knew no other age of ability to do or suffer, but the age above One and twenty years: And in *Alfred's* time a Judge suffered death for passing death upon one under that age. Albeit the Canonists had in those days brought into custom other ages of ability in matters concerning *Marriage*; al-Lindenb. though it may well be thought that it required no less maturity to manage the affairs of a married life, than to discern the nature and difference of manners, especially in case of crimes, which are contrary to the very light of nature. gloss. Miror. c. 5. Sec. 1.

C H A P. XXXVII.

Of the several Manners of extraordinary Trial by Torture, Ordeale, Compurgators, and Battle.

Evidence of the matter in fact, upon trial of Causes in the Saxon Judicatory, sometimes consisted in the pregnant testimony of the Fact itself, and sometimes in the testimony of some Circumstances. The first was an unquestionable ground of conviction; the second was too weak to command the *Verdict*, although sometimes it persuaded it; and therefore those incompassionate times found out a trick of extorted confession by torture of the party, following the principles of passion therein, rather than sober judgment; for circumstances are sufficient to irritate the hearts of those that are passionate; and where Jealousy is once entered, there's no place for sparing; be the matter never so untrue. Yet I do not find any Law amongst the Saxons to patronize this fashion of conviction; albeit it seemeth it was practised, for *Alfred* the King punished one of his Judges with death for passing Sentence upon an extorted confession by Torture before the Coroner. And possibly it might be gained from the *Lacedemonians*, altho' little to the praise of their *Greekish* wisdom in that particular; seeing that in all reason it must be supposed, that Fear and Grief will enforce Flattery upon the Tormentor, as well as Self-love draw forth Flattery to the Benefactor. Mirror. cap. 5. Sec. 1. Cragius.

A second sort of Evidence was that of *Ordeale*, being also grounded upon a pre-conceit or suspicion: the manner hereof was diverse. The thing seemed to be the birth of the Brain of some Churchman, who had read of the *curfed Water*. The first mention that I find thereof was at the Council of *Mentz*, and afterwards in the Council of *Triers*; but not a footstep thereof in this Kingdom till by *Æthelstan* it was advanced into the degree of a Law; after which time it continued in use well nigh three hundred years. A strange monument of God's indulgency to an ignorant Age thus turning extraordinary to ordinary, for the clearing of innocency; and (which is no less wonderful) allowing in those times unto men under nature such a power over themselves, as to adventure against nature. Doubtless that man or woman was of a daring spirit that first tried the trick, if he had not a miraculous faith in that promise *Cum ambulaveris per ignem*; &c. and it shewed mettle in them that followed the example. But the next age grew dull, and men being weary of such bane-touches, the Clergy that cried it up, their

their successors cried it down, and so devoured their own birth without any difficulty, other than a bare injunction of a King, that had power to command only such as would obey,

Spicil. Selden. But where fame was yet more slight, and springing rather from want of charity and misapprehension, than promising circumstances, men were wont to be contented with a *voier-Dire*, or the Oath of the party suspected, and the concurrent testimony of other men*: The first attesting his own innocency, the other con-
by Ll. Hoeli to be frequent among the Britons. testing their Consciences of the truth of the former testimony; and therefore were, and still are called *Compurgators*. Their number was more or less, and of greater or less value, according as the offence or the party suspected was

Ll. Edm. c. 16.

An. 647.

Ll. Canut. cap. 5. Battle.

of greater or less concernment. This manner of trial was of ancient use, and both it and that of *Ordeale* under the directory of the *Clergy*; yet this was the ancients by three hundred years, and first brought into this Nation by the Council at *Bergbamsstead* under *Bertwald* Archbishop of *Canterbury*. And it was performed sometimes more solemnly by solemn receiving of the *Eucharist*, especially if the person suspected was of the sacred Function.

Mirror. cap. 2. Sect. 13.

One manner of trial yet remains, which was used both in trial of matters of *Crime* and *Title*; and it is the trial by *Battle*, which was in *criminal* matters with sharp Weapons; but in *titulary* matters with blunt Weapons. No Defendant could refuse *Battle* offered, but such as were too excellent, as the *King*; or too sacred, as the *Clergy*; or too weak, as *Women*, *Maimed Persons*, and *Children*; or too inscient, as *Idiots* and *Lunatics*; or too mean, as *Villains*. And as these were not necessitated to answer in *Battle*, so was no *Freeman* compelled to answer them by *Battle*. This was an old way, as may appear by the conclusion of *Appeals*, and seemeth more satisfactory than that of *Ordeale*; because this rested upon the Consciences both of *Appellant* and *Defendant*; whereas *Ordeale* rested only upon the single Conscience of the *Defendant*, which oftentimes was rather hardy than innocent. And the continuance of this trial in *title*, even at this day, shews that men can away with this, and that there is not evil sufficient in it to eradicate this weed, although it be kept under ground: partly because it is fatal, and partly because both Scripture and Experience shews, that Right and Victory always do not concur.

C H A P. XXXVIII.

Of the ordinary Manner of Trial amongst the Saxons by Inquest*.

Inquest.

THE last and most ordinary way of trial was by Witnesses (upon traverse of the matter in Fact) before the *Jurors*, and their votes thereupon: this made the *Verdict*, and it determined the matter in fact. In former time questionless it was a confused manner of trial, by Votes of the whole multitude; which made the *Verdict* hard to be discerned: But time taught them better advice, to bring the Voters to a certain number, according to the *Grecian* way, who determined controversies by the suffrages of Four and thirty, of the major part of them. But

Emmius.

how

* Note, This Manner of Trial appears among the *Britons*, *Ll. Hoeli. sparsim.*

how the number came to be reduced to *Twelve*, I cannot conjecture, unless in imitation of that rule of *Compurgators*, that ordinarily exceeded not that number. The first Law that defined this number, was that of *Ætheldred*, about three hundred years before the Conquest. *In singulis Centuriis, &c.* In English thus: *In every Century or Hundred let there be a Court; and let twelve ancient Freemen, together with the Lord of the Hundred, be sworn that they will not condemn the Innocent, nor acquit the Guilty.* And this was so strictly eyed, that *Alfred** put one of his Judges to death for passing Sentence upon a *Verdict* corruptly obtained, upon the votes of the *Jurors*, whereof Three of the *Twelve* were in the Negative. And the same King put another of his Judges to death, for passing sentence of death upon an *Ignoramus* returned by the Jury. And a third, for condemning a man upon an Inquest taken *ex officio*, whenas the Delinquent had not put himself upon their trial.

But the Saxons were more careful of the credit and life of man, for no man's life or credit rested altogether upon the cast of *Twelve* opinions: but first *Twelve* men enquired of the same and ground thereof; which if liked, rendred the party under the spot of delinquency, and meet to be looked upon as under the suspicion of the Law, who formerly was but under the suspicion of some particular man. And then was a second enquiry of the fact, if the party traversed the vote of Fame. In both which trials the *Verdict* grounded itself upon those *allegata* and *probata* which were before them. The first of these enquiries was before the *Coroner*, who, even in these old days, had the view of Bloodshed. The second was had before the Judge of life and death: neither of which could legally indamage the party without the other, unless the Judge meant to answer it with the peril of his own Person and Estate; as it befel in *Alfred's* time, when a Judge suffered death for passing Sentence upon the *Coroner's* only Record; unto which a Replication is allowed, as the Book saith. And another Judge had the same measure for condemning one without *Appeal* or *Indictment* foregoing. Where, by the way, might note another difference between *Appeals* or *Indictments* in this; that were and are the more speedy Trials than *Indictments*, inasmuch as the former were but one act, the latter two.

And yet time and experience refined this way of trial into a more excellent condition: For the bloody times of the Saxons first age passing over, and peace arising by degrees, they, together with the Britons, began to *intercommon*, and about the *Marches* became a mixt people under a mixture of Government and Laws, as hath been already noted. Amongst which one concerned their way of trial of matters of fact by a *Jury* mixt both of Britons and Saxons, which was settled by a Law made by *Ætheldred*. *Viri sint, &c.* In English thus: *Let there be twelve men of understanding in the Law, six of them English, and six Welch, and let them deal Justice both to English and Welch.* The equity of this Law in future ages spread itself into all Trials of Foreigners in every place throughout this Island. such as stumble at this conceit, because they are said to be *ætate superiores*, and *jure consulti*, I shall only note thus much; That it is not to be doubted, but the work of *Jurors* required chief men both for experience and knowledge in the customs of those times, to enable them to judge of the matter in fact; and upon whose judgment the Life and Death of the party rested principally: And as probable it is, that those *Jurors*, as they were then chief men, so they sate in the most

* Note, *Alfred* had many of his Laws from the Britons, vide *Alfred's Life*.

eminent place of the Assembly or Court, and were *Co-assessors* with the Bishop and Sheriff, who did serve but only to advise the rest; and they, or one of them, to publish the Sentence which the Law predetermined. And this chief place the *Jurors* might have possessed at this day, as they do in *Sweden*, had the chief men holden the service still worthy of their attendance.

Peers.

But great men grew too great in their own esteem for the service of their Country, betaking themselves to serve themselves; and matters of highest employment were left to those of the meaner condition; who being in their own persons of less admiration, were thought unmeet to sit in such eminent places, and so from the Bench descended to the Floor, as at this day. This diffiduousness of the greater sort made one step further to the full perfection of that manner of Trial both of the Persons and Estates of the *English*, which hath been the envy of other Nations, and is called the trial *per Pares*, or by Peers. For the pride of the *Danes* (now growing into one people with the *Saxons*) not enduring such fellowship with the mean *Saxon* freemen in this publick service; and the wise *Saxon* King espying the danger in betrusting the Lives and Estates of the poorest sort unto the dictate of these superbient humours; and on the contrary in prostituting the nobler blood upon the vote of the inferiour rank of men, provided a third way, and by agreement between him and *Gunthurne* the *Dane*, settled the Law of *Peers*. *Si minister regius, &c. If a Lord or a Baron be accused of Homicide, he shall be acquitted by Twelve Lords: but if of inferiour rank, he shall be acquitted by Eleven of his Equals and one Lord.* Thus God's providence disposed of the pride of men, to be an instrument of its own restraint: For the great men, ere they were aware, hereby lost one of the fairest Flowers of their Garland, *viz.* the *Judicature*, or rather the mastership of the Life or Death of the meaner sort; and thereby a fair opportunity of containing them for ever under their awe. And no less remarkable was the benefit that redounded to this Nation hereby; for had the great men holden this power, as once they had it, it might soon have endangered the liberty of the *Freemen*, and thereby been destructive to the Fundamental Constitution of the Government of this Realm, which consisteth in the just and equal participation of these Privileges, wherein all are equally concerned. This was the trial wherein the people of this Nation were made happy above all other people, and whereby the *Freemen*, as they had the *Legislative* power, so likewise had the *Juridical*; and thereby, next under God, an absolute dominion over themselves and their Estates. For though this course of trial was first applied to matters of Crime, yet it soon also seized upon the *Common-pleas*, which for the most part was the work of main import in the *Hundred Court*; and suitable hereunto are the prescriptions which are extant in the Law-books of *Cognizance of Pleas*, and *Writs of Affize*, &c. from the times of the *Saxons*, as in that case of the Abbot of *Bury* amongst others doth appear.

11. Alured.
Concil. Brit.
fol. 499.

26. aff. pl. 24.

CHAP,

C H A P. XXXIX.

Of passing of Judgment and Execution.

AFTER *Verdict*, Judgment passed according to the letter of the Law, or known Custom; in criminal matters, according to the greatness of the offence, either for death or loss of Member. But if the circumstances favoured the Delinquent, he was admitted to redemption of Life or Member, by Fine also settled by letter of the Law, and not left to the Judge's discretion. If the Crime reached only to shameful penance, such as *Pillory* or *Whipping*, (the last whereof was inflicted only upon Bond-men) then might that Penance be reduced to a *Ransom* (according to the grain of the offence) assessed in the presence of the Judge by the *Freemen*, and entered upon the Roll, and the *Estreat* of each Ransom severally and apart sent to the Sheriff. This *Ransom* was paid usually unto the King and Lord, and the party indamaged, or his friends, if the case so required; according to the old German rule, *Pars mulctæ Regi vel civitati, pars ipsi qui vindicatur, vel propinquis ejus*. This course opened indeed a way for Mercy; but, through corruption, a Flood-gate to Wickedness in the conclusion. Of Imprisonment there was little use in the eldest times; afterwards it was more used, not only to secure the person to come to trial of Law for miscarriages past, but sometimes to secure men against committing of future mischief, especially if it more concerned the publick. I find but little or no use thereof barely as a punishment, nor would their Ancestors so punish their Bondmen: *Vinculis coercere rarum est*. In case of Debt or Damage, the recovery thereof was in nature of *elegit*; for the party wronged either had the offender's goods to him delivered, or the value in money upon sale of the goods made by the Sheriff; and if that satisfied not, then the moiety of the Lands was extended, and so by moieties so far as was possible, *salvo contemento*; and when all was gone, the Defendant's Arms (which were accounted as the *Nether millstone*, or stock of maintenance) were last of all seized; and then the party was accounted undone, and cast upon the charity of his friends for his sustenance: but the person of the man was never imprisoned as a pledge for the debt, no not in the King's case. *Alfred* imprisoned one of his Judges for imprisoning a man in that case. One punishment of death they had in cases of crime, and that was by hanging or strangling; and where the crime was not so great, sometimes ensued loss of member or mutilation, and in many such cases *Excommunication*, pronounced indeed by the Clergy, but determined by the Law; which in the first conception was framed in the womb of the Legislative Power in Parliament, as may appear in many Laws there made; nor was there in those times any question made of the cognizance thereof, so long as the Clergy and Laity had charity enough to join in all publick Councils.

Ll. Inz. c. 3.

&c.

Ll. Canut.

Ll. Inz. c. 22.

Tacitus.

Ll. Edw.

Ll. Alured.

c. 1.

Miror. c. 5.

Sect. 1.

Concil. Brit.

105, 251, 365,

420.

Of the Penal Laws amongst the Saxons.

PASSING the Courts and Manner of proceedings till Sentence, we are now come to the particular Laws that directed the Sentence; and first of those that concerned criminal offences. During the *Saxons* time the Commonwealth was in its minority, the Government tender, the Laws green, and subject to bend according to the blast of time and occasion, and according to the different dispositions of Governours, Ages, and People: For though the *Saxons* were in name our *first matter*; yet not they only; but they having once made the breach open, and entred this Island, it became a *common Sewer* to the Excrecence of those Eastern peoples, the *Angles, Danes, Almains, and Goths*, as their several Laws left with us in power do not obscurely inform us; and amongst all the rest, the *Goths* were not the least concerned herein: for the *Saxon King* determining what people shall be holden *Denizens* in this Kingdom, saith, *That the Goths ought to be received and protected in this Kingdom, as sworn Brethren, Kinsmen, and proper Citizens of this Commonwealth.* Nor can any Nation upon earth shew so much of the ancient *Gotbique Law* as this Island hath. Nevertheless in this mixture of people of several Nations, there being a suitable mixture of Laws; as the power of any one of these peoples changed, so likewise did their Laws change in power; and long it was ere a right temper of one uniform Law could be settled; yet in the interim, these short remembrances left unconsumed by time I have subjoined, that it may appear their motions were excellent, though somewhat inconstant in their practice.

Those times were dark, and yet so far as any light appeared, the people were to be honoured for their resolution in the defence thereof. For there was few of the *Commandments* of the two Tables which they did not assert by Laws by them made, the third and tenth excepted; which latter *commands* the inward man only, and whereof God hath the sole cognizance.

The first Commandment.

Witchery.

11. Sax. c. 6.

The second Commandment.

True it is that the first *Commandment* containeth much of the same nature: yet somewhat is visible, and that they bound: For whereas in those times the Devil had such power, as he did prevail with some (and those it may be not a few) to renounce God, and deliver themselves wholly to his own will; they punished this crime with banishment, as judging him unworthy their society that would communicate with Devils. Yet if the Delinquent had done any mischief whereby death ensued, the party's punishment was death; yet might all be discharged by *Ransom*, and good security for good behaviour for time to come.

For their worship of God, they were no less zealous in maintenance of the manner; as their Forefathers liked not the use of *Images* or Pictures for adoration, neither did they: and though the Clergy in other matters led them much, yet in this they were alone for a long time: for though the *Roman Church* had the use of *Images* above three hundred years before *Austin's* coming, yet could not that custom fasten upon the *Saxons* for the space of above one hundred years after *Austin's* coming; notwithstanding the endeavours of *Charlemain*, and Pope *Con-*

stantine

Antine (by his bastard-decree begotten upon the dream of the Bishop of *Worcester*) that saw the *Virgin Mary's* picture brought him in his sleep by herself, and with a command from her, *That it should be set up in the Church and worshipped*: I say, it could not fasten any constant practice of Idol-worship, nor ever wrest a Law from the *Wittagenmote* to countenance the same; but rather on the contrary, they still preserved the memorial of the second *Commandment* in the Decalogue, even then when as the Romanists had expunged the same out of the number: and they enforced the same by a Law of their own making, so far as their Clergy, or Reverence they bear to *Rome*, would allow. Concil. Brit. 218.

It hath been formerly observed, that the *Saxons* took no note of the vice of *profane swearing* and *curfing*; which crime (if it were in use, as it cannot be otherwise conceived but it was) as the times then were, must lie upon the Clergymens account for their neglect of teaching the point; or upon the general ignorance of those times, which understood not the *Commandment* nor the Scripture: For we find no Canon against it, nor scarce any Doctrine concerning it, but only in case of *false swearing*, till *Anselm's* time. True it is, that *Cbrysoftom* seemeth zealous against all *swearing*; but that was his personal goodness, which for aught appeareth died with him. And *Anselm* contending against *swearing* by the Creatures, and *idle swearing*, renders his grounds in such manner, as it may be well conceived he understood not the main. The third Commandment. Cent. 1. c. 4. de leg.

I am the rather induced to conceive charitably of those times, in regard of their exceeding zeal for the honour of the *Lord's day*; which sheweth, that so far as their knowledge would maintain them, they had zeal to make it into action. They began this day doubtless as other days, according to the custom of their Forefathers in *Germany*, *Nox ducere diem videtur*. And because they would not allow their secular affairs to trench too nigh that day's devotion, they made the *Lord's-day* to begin on *Saturday* at three of the clock in the afternoon, and to continue till Monday morning. No pastime, no not their beloved sport of Hunting, was allowed during all that while; nor no works were to be done, but such as concerned the Worship of God: and those Laws they bound with penalty of *Fine*, if the Delinquent were a *Freeman*; if he were a *bond-servant*, he was to be whipped †. Nor were these the Laws of one King or Age only, but of the whole current of the *Saxon* Government; and may (although dark times they were) yet put us in these days of light to the blush, to enter into comparison with them for their Devotion. The fourth Commandment. Tacitus. Concil. Brit. 445. 446. Ibid. 268, 377. 404, 518, 546. † Ll. Inæ. c. 3.

In their Conversation with men, the *Saxons* seemed yet more strict: and being a people of a publick spirit, they preferred the good of their Country above all; accounting Treachery against it, or neglect thereof in time of danger, to be a Crime of the greatest concernment, and to be punished in the highest degree, *Proditores, & transfugas arboribus suspendunt*. Other Treason than this, no not against Kings, did they then acknowledge any; and therefore the form of the *Indictment* for contriving the death of their King, concluded only *Felonice*, as may appear in that form of an *Indictment* for an offence of that nature intended and plotted against *Edmond* the *Saxon* King: Whenas for the plotting against *Alliance*, though of common and inferiour nature, the *Indictment* concluded *Felonice & Proditorie*. And whenas the penalty, in case of Treachery against the Country, was death, and forfeiture of the whole Estate, both real and personal: In Treachery against the King, it was only loss of life, and of the personal Estate. And therefore it may The fifth Commandment. Tacitus. Miror. cap. 2. Sec. 11. Miror cap. 2. Sec. 13. Ll. Edw. c. 48. Concil. Aenham 25.

may seem that Majesty had not yet arrived at its full growth; or else that the greatest measure thereof rested in the body still.

The Sixth Com-
mandment.

Man-slaughter

Sax. Lamb.
fol. 17. 18.

Mirror. cap. 5.
Sec. 1.
Li. Alured,
Sax. preface
Lamb.

Glossar. p. 4.
Li. Canut.
cap. 93.

Tacitus.

Englshire.
Stamf. lib. 1.
cap. 10.
Mirror. cap. 1.
Sec. 13.
Brafton lib. 3.
tract. 1. c. 13.
Breach of peace

Batteries.
Maimes.
Imprisonments.

Alured preface.
Lamb. 17.

Li. Edw. c. 31.
Li. Sax. c. 36.
Li. Iniz. c. 6.
The seventh
Commandment.
Baron. Annal.
745. num. 5.
Concil. Brit.
558.

If in any thing the Saxons were indulgent, it was in *matters of Blood*; for they were a warlike people, and looked upon it as under the regiment of valour; and therefore it was punished only with *fine*, according to the old rule, *Luitur homicidium certo armentorum & pecorum numero*. So as even in *Germany* they had learned a trick to set a price upon that crime; and this they afterward called *Manbotta wera wirgilda wita*, and *lastblight*: and, which was worse, they countenanced that which in after-ages was called *deadly feud*; and so under colour of punishing Murder with revenge, they added blood to blood. But as times grew more tame, and inclining to Civility or Religion, the cry of Blood was more hideous; and this urged on the Law of *Appeals*, and so private revenge became under the power of the Law, which punished death with death, favouring of such a King as *Alfred* was, who first taught the Scriptures to speak in the dialect of our own Laws; like the *Rubrick* amongst the *Canons*, bringing therewith both strength and beauty: yet they had degrees of *blood-shed*, and made a difference in the punishment; for some sprung from sudden passion, but other was *forethought* and purposed; which last they called *Abere Murther*, or Murther by *foreplot* or treachery; and this was made *nullo pretio emendabile*; and yet towards the times of the *Danes*, devotion grew of so high a dye, that a *Sanctuary* could represent any bloodshed more allowable, if not acceptable, under the golden colour of recompence made to the King, the Lord of the party slain, and the parties friends, for the loss of a Subject, a Tenant, and a Friend, according to that of their forefathers, *recepitque satisfactionem universa domus*. It would be too tedious to recite all the particular Laws, with their changes, and therefore they shall be left to the view in the several Laws of *Alfred*, *Edmond*, *Canutus*, and *Edward*, the Saxon Kings. Yet one custom first begun by the *Danes*, I cannot omit: That if a man were found slain, whose parents or friends were unknown, by common intendment, he was presumed to be a *Dane*; and then if the delinquent were not taken, nor fled to *Sanctuary*, nor known where he is, the whole Hundred was amerced for the escape; but if the party slain were known to be of *English* Parents, it was otherwise. This custom lasted long after the *Normans* time, the *Dane* being only changed into the *Norman*, and was called *Englshire*. Ba teries, Maimes, Imprisonments, and other breaches of peace, were punished by *Fine*, which they called *Fightwitt*, *Grithbrece*, or *Frittbreck*; and the Delinquent ordinarily put in sureties for the peace for future time. The fine was increased by the number of Delinquents joining in the fact: for if seven joined, it was a *Riot*, and the Fine was then called *Flotbbote*. If the number were five times so many, *viz.* thirty and five, then it was a *Rebellion* or War. Secondly, the fine was increased by the time or season of the fact, as in *Lent*, or while the Army was in the field; because, in the first case, the holy time was prophaned; in the second, the Country was more endangered, when the strength was abroad, and the Army might be discouraged at the news of the disturbance at home. And therefore the Saxons punished this with death, or fine suitable. Thirdly, the fine was the greater in case of the excellency of the place, where it was *holy ground*, or in the presence of great persons, such as the King or Bishop. *Adultery* among the old *Germans* was holden a crime of a high nature; the penalty of the woman that committed that crime was death: I find not what became of the man. In latter times of the Saxons it grew less penal, and more common.

common: By *Alfred's Law* it was finable, and the fine called *Legierwit*. By *Canutus* the man was fined or banished, the woman to lose her nose, ears, and her portion. *Incest* was more penal to the man than Adultery, and yet it touched not his life.

Ll. Canut. 50.
reg. 22.
Incest.
Ll. Sax. 48.
reg. 19.

Robbery amongst the *Lacedemonians* was accounted but a trick of youth; the *Athenians* thoughts were more severe. The *Germans* likewise differed in their censures concerning it; the *Saxons* punished it with death, but the *Angles* with fine only; yet *Ina* the King made it mortal, and *Canutus* followed him therein; and *Edward* the Confessor limited that punishment to thefts of twelve pence in value, or above. *Burning of woods* was finable by *Ina's Law*; but *Burglary* was Felony. In King *Edmund's* time only the *Danes* made it finable; possibly being guilty in their own Consciences of their own propensity to rapine and plunderings. This privilege of the dwelling-house was anciently called *Hamsoka*, or *Hamsoken*, or *Hamsokne*. *Trespases* committed upon ground were all comprehended under the general name of *Ederbrece*, or *bedge-breaking*; and the penalty was not only the damage to the party, but also fine to the King upon Action, which in these days passeth under the name of *Quare clausum fregit*, according to the words of the Writ. The damages were more or less, according to the time or season when it was done: for if when the Army was abroad, the damages were doubled; and in like manner, if done in *Lent* time. If the trespass was done by a Beast, the owner must pay the damages; but if it were occasioned through the complainant's default (as through his gap) no damages were paid. The constant fine to the King in all such trespasses, was by *Alfred's Law* set at five shillings. Other Actions also were then used, as touching damage done to Goods, and Actions upon the case: for in *Alfred's* time the Plaintiff recovered not only damages for trespasses done to Possessions and Goods, but also costs for injuries in point of scandal and defamation, in case the complainant specially declareth that he is thereby disabled, or indamaged in his preferment, and maketh proof of the same; suitable unto the forms of our pleading at this day, which conclude with *per quod*, &c. or *Et deterioratus est*, &c.

The eighth
Commandment.
Lind. Ll. Aug.
& Sax.
Ll. Sax. 4.
reg. 3. Miror.
26.
Burning of
Woods.
Burglary.
Ll. Ed. cap. 6.
Ll. Canut. p.
59.
Trespases.

Ll. Sax. c. 36.

Ll. Inæ. 5, 6.
Ibid. c. 40.

Ll. Sax. c. 36.

Miror. p. 301.

The N. n. b
Commandment.

Ll. Æthelst.
c. 12.

Ll. Canut. c. 5.

Spec. Sax. l. 3.
art. 53.

Ll. Edw.
cap. 18.

The *Saxons* were utter enemies to *Perjury*; they punished it with eternal discredit of testimony; and sometimes with banishment, or with grievous fines to the King, and mulcts to the Judge. For that difference I find observed in those days between fines and mulcts, albeit the more ancient times used them for one and the same; for so the Historian *pars mulctæ Regi*. In all these matters where any interest was vested in the Crown, the King had the prerogative of pardon*; yet always the recompence to the party was saved; besides the security of the good behaviour for time to come, as the case required.

* The King could pardon Crimes only quoad himself. Vide Ll. *Alfredi* in *Lambard*, fol. 19, 20. and *Wilkins*, pag. 28, and 32.

C H A P. XLI.

Of the Laws of Property, of Lands and Goods, and their manner of Conveyance.

Mirror. cap. 5.
Sec. 1.

Inheritance.
• Wilkins,
Sax. Ll. 43.
Ll. Alvred. 37.

Dower.

Plat. vit. So-
lon.
Apotheg.
Lacon.

THUS passing over some tops of Saxon Penal Laws, besides the general rule or Law of *eye for eye, tooth for tooth, &c.* it now remains as lightly to glance at a few generals concerning the settling and *property* of possessions in point of Title; concerning which, although it be true that the Conquerors of this part of the Isle were a body aggregate of many Nations or peoples, and so divers customs must necessarily settle by common intendment in several places, according as they chose their habitation: yet the general custom of the *Germans*, as touching descent of *inheritance*, was to the eldest * Son. For *Tacitus* speaking of the *German Cavalry*, saith, *That the Horse of the party dead went not to the eldest Son, ut cætera, but to the most valiant man amongst them of that Linage*; which words *ut cætera* do plainly intimate, that other matters of profit passed to the eldest Son in point of descent. Nor can I conceive how men should be induced to conceit, that the custom of *Gavelkind* was the ancient general custom of the *Germans*. It is true, the words of the same Historian have misled some; the words are, *Hæredes tamen & successores cuique liberi*; these taken collectively, I grant may import somewhat tending that way; but they may as properly be taken disjunctively, that the Children inherit by course; and if none such were, then the Brothers; if they failed, then uncles. And it is not only evident, that in the publick Succession to the Crown they had an eye this way, but in the descent of private and particular estates, as by many instances out of those old Histories may appear; and had any other custom been general, *Alfred's* rule by *Moses's* Law had never succeeded; nor could that other custom hold out against the constant desire of the *Saxons* to perpetuate their Families in greatness and honour: all which, besides the express Laws set forth in the *Codes*, are in my conceit sufficient to induce an Historical Faith, *That the general course of descent was to the eldest Sons, and not to all jointly*. Nevertheless out of this Estate of Inheritance, divers particular estates were created, as well by common custom, as by the especial act of the owner of such an estate. Such of them as were wrought by custom, was occasioned from Marriage, whereby if the man was settled of such estate as formerly hath been recited, and died, his Wife surviving, by ancient custom she had her *Dower*, or third part of such estate of inheritance. This custom, though ancient, yet was not originally from the *Germans*, but from the *Latins*, who used to give *Dower* with the man, and receive *Portion* with the woman. But the *Germans* learned from the *Greeks* otherwise; for the Laws both of *Solon* and *Lycurgus* forbade the latter, lest Marriages should be made for reward, and not grounded upon affection; which, as they conceived, would be a means to maintain the strength of mankind in generation. And therefore *Tacitus* noteth this by way of Antithesis, *Dotem non uxor marito, sed uxori maritus offert*. The *Dower* that was given in the first times was Goods; and these were utensils for War. And the Wife many times returned to the man tokens of her love, in the same kind, and not as gages of future maintenance, unless we shall account

account War their proper calling from whence their livelihood issued. Succeeding times growing more calm, changed the custom of fighting into trading, and taught them to prefer the Stock gotten by commerce, before that of War; and so the *Dower* was changed. This course continued all the *Saxons* time, for aught I can find; for not much above threescore years before the Conquest, it was by a public Law confirmed, that the Bridegroom before Marriage should set forth that portion of Goods that should be his Wife's; and these were ever afterward holden her own proper Goods. But if no such provision was made before Marriage, then the Law or Custom gave the Wife half her Husband's Goods, if she outlived him; and if there were Children, then the whole estate in Goods, to provide for herself and them, until she took a second Husband: but if the Husband suffered death as a Malefactor, the Wife was to have but one third part. I find no footsteps of *Dower* in Lands until the *Normans* time; who were also as well owners of the Wife's personal estate, as of their persons, and before which time the *Saxon* Wives in divers regards were more absolute and independent; I say not more happy, because they were never one with their Husbands, nor were they ever under the Law of *free-pledge*, as Wives; nor was the Husband his Wife's *pledge* as he was her Husband, although as a Master he was *free pledge* for his servants: for the Law was, that in case the Husband carried his Wife away into another Lordship, as he must give *pledges* that his Wife shall have no wrong; so she must give *pledge* by her friends that she shall do no wrong; and she passed therefore as an *appurtenant* to her Husband, rather than one in unity with him; and her estate or portion was rather *appurtenant* to her than him: for if she failed in her good carriage to her Husband, she was to make amends out of her own Estate to her Husband; and if her estate sufficed not, then her *pledges* were to satisfy her Husband. Nevertheless what failed in the relation of the Woman to the Man, was supplied in the relation of the Man to the Woman; for, besides the respect the Men bare to the Women, as their Wives, they honoured them as *German* Women, that admired valour in all, idolized it in their Husbands, and shared in it themselves; and upon occasion merited thereby not only to be companions in honour, but triumphers above Men, yea their Commanders and Governours. Nor was this the original trick of the rude and uncompt *Germans*, or barbarous *Britons*, but of the wise *Greeks*, and received (as may be supposed) from the *Lacedemonians*, upon as good ground as the Wife of *Leonidas* the *Lacedemonian* King rendred; who being asked why the *Lacedemonian* Women ruled their Husbands: It is true, said she, for we only know how to obey our Husbands. A second particular estate, which the Law derived out of the inheritance, was advancement to the Husband; for the *Saxons* were not so stupid as to refuse favour proffered: and therefore they made a Law of Counter-tenure to that of *Dower*, which we commonly call *tenure by the courtesy* of England; which was but a perquisite of the Wife's estate given to the Husband, in case he over-lived his Wife, and had issue by her born alive. The name was probably given by the *Normans*, who as it seemeth had no such custom; and therefore they gave it the name from the *English* (albeit since that time *Scotland* hath also allowed it amongst them) who might probably bring it into this Kingdom or Country amongst the mingled people: for this Custom or Law is found amongst the ancient *Almain* Laws; differing only from the Law this day in the evidence of the title, which now ariseth upon the birth of the Child heard to cry; whereas in those days the title

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vested

Ll. Sax. Lamb.
Edm. fol. 76.
Ll. Sax. 50.
Reg. 22.

Ll. Sax. Lamb.
fol. 14.
Ll. Inz. c. 51.

Ll. Ed. Lamb.
cap. 7.

Never-Ll. Sax. 50.
Reg. 22.

Courtesy of
England.

Ll. Alm. tit.
92. Lindenbr.
cod.

vested not unless the Child opened his eyes, *ut possit videre culmen domus, & quatuor parietes*, which toucheth not only the opening of the eye, but also the rowling of it about. [This excluded Ideots.]

Estates that were derived out of the Estate of an Inheritance by the act of the party, either were such as concerned the whole Inheritance, or part thereof. That which concerned the whole Inheritance, was nothing but a parcelling of it out according to the will of the giver; and this was afterwards called *Estate Tail*; which passed also amongst some places by way of custom, as amongst the *Angles* it was a Law that the Inheritance should pass unto the Issue-males on the Father's side until the fifth generation, before any title could accrue to the Issue female; and then, according to their Proverb, it went *from the Lance to the Spindle*. But the *Danes* possibly might prevent this in the continuance thereof; for they brought along with them that which was formerly the *Saxon* custom, which carried the Inheritance unto the Daughters, upon the failing of the Issue Male, as in the example of *Cenedritba* Daughter to *Cenulphus*, amongst multitudes of others may appear. But where Lands were conveyed by writing or act of the party, it was a Maxim, *That the Will of the Conveyer should be strictly observed*; nor could any one that came in by virtue of such Writing ever alien the Land to cross the current of the original Conveyance. The *entailing* of Estates therefore was very ancient, although by corrupt custom it was deluded, as the Lord *Dier* in his argument of the *L. Berklie's Case* observeth.

Another custom of Inheritance was catcht I know not how, it's called *Borough-English*, and by the name may seem to be brought in by some Cynical odd *Angle* that meant to cross the World, and yet in a way not contrary to all reason: for where nature affords least help, the wisdom of men hath used to be most careful of supply; and thus the youngest became preferred before the elder in the course of descent of Inheritance, according to this custom. There is no further monument of the antiquity hereof that I have met with, than the name itself, which importeth that it sprang up whiles as yet the names of *Angles* and *Saxons* held in common cognizance; and might arise first from the grant of the Lords to their Tenants, and so by continuance become usual. And by this means also might arise the custom of *Copy-holds* of this nature so frequent, especially in those Eastern parts of this Island where the *Angles* settled, and from whom that part had the name of the *East-Angles*.

Another custom of descent remaineth, and that is to all the Children collectively, and it is called *Gavel-kind*, or *Gave-all kind*: and by the very name seemeth at the first to arise rather from the donation of the Parent or other Ancestor, contrary to common custom, than by common Law; otherwise no need had been of an especial name. In the Original it seems it equally concerned all, both Sons and Daughters, as Parceners; and for want of such, the Brothers and Sisters. It seemeth to be first the Law of the *Goths* or *Jutes* †; for it remaineth in use in these parts of the Eastern Countries. But in latter times this estate was also *tailed*, or cut out sometimes to the Sons and Daughters severally; that is, the Sons or Brothers to have two parts, and the Daughters or Sisters one part: other times to all the Sons, and for want of such, to all the Daughters. And thus these courses of estates passed over Seas to the Southern part of this Island, where that people most settled, in a double

† 'Tis evident this was an old Law among the *Britons* and *Irish*.

double stream; the first from the *Atbenians*, that loved the stateliness of their Families; the other from the *Lacedemonians*, who desired rather the continuance of their Families than their greatness. of Emmius. Grec.

The manner of conveying of Estates between party and party, was either by act of the party executed in his life-time, or after his death. Such as were executed in the life-time of the owner, and were such as for the most part were in matters of great moment, were Estates passing by deed of Conveyance in writing: And for this way the Saxons were beholden to the *Latins**, who taught them that course, both for form and language. And *Alfred* enforced it by a particular Law, viz. *That all such as hold Lands by Deed in Writing should hold them according to the intent thereof, and not alien the same contrary thereto, the intent thereof being proved by Witnesses.* The nature of the Conveyances in these ancient times may appear by a Deed of one of the Kings of this Island about 400 years before the Conquest, whereby he granted Four Plough-lands in the Isle of *Thanet*, unto an Abbess; wherein, instead of that which we now call the *habendum*, the words are *contulimus possidendum*, &c. and after that followeth the *uses* of the Deed, *tuo usui*, &c. and then concludes with a *Warranty*, in these words, *tu vero successoresque tui defendant in perpetuum, nunquam me hæredesque meos contra hanc chartulam aliquando esse venturos*: the effect of which last clause may appear by the Law of the sale of Goods, which in those times was, that if the sale of Goods warranted did not hold, the loss should light upon the sellers. The Deeds were usually subscribed with the name of him that made the Conveyance, or passed the Estate; and if he could not write his name (as it befel often) then the Deed was under-signed with his mark: For *Withered* King of *Kent* used the sign of the Cross in subscribing his Grants, *pro ignorantia literarum*. They used also in those days to seal* their Deeds; for so much the conclusion of King *Ina's* Charter to the Abbey of *Glastenbury* importeth, in words to this effect in English, *I Ina the King, do confirm this Grant and Liberty, by subscription of my own hand, and under the seal of the holy Cross.* True it is, *Ingulphus* tells us that *Seals* to Deeds were of *Norman* original; I believe his intent is concerning *Seals of Wax* annexed or affixed unto Deeds. Lastly, in those days also they used to attest their Deeds, by subscribing the names of such as were present; who being of greater or meaner rank, rendred the credit of the Deed accordingly more or less valuable: and upon this ground did the acknowledging or proving of Deeds before the King, Bishop, County, or Hundred, first arise. Conveyances in writing. or rather the Britons. Ll. Sax. c. 31. Habendum. Ufe. Warranty. Ll. Inæ. c. 74. Ll. Sax. c. 24. Ll. Edw. c. 21. Signed. Sealed. Concil. Brit. p. 198. Witnesses. Acknowledgment.

That was the *Roman* fashion; but the more ancient *German* way of Conveyance was by *Livery* and *Seisin*, as most suitable to their ignorance, who had Learning in as slight account as the *Lacedemonians* had, and cared for no more than would serve the turn of natural necessity. A property they had both in Lands and Goods; and where that resteth, no man can deny them the natural way of giving and receiving by delivery. And therefore though matters of ordinary use seldom come into the observation of story, and this petty ceremony might very well pass *sub silentio*; yet we are not altogether left destitute of the footsteps thereof in antiquity. For *Ætbbald* the *Mercian* King, above eight hundred years ago, gave the Monastery of *Cuthan*, with all the Lands thereunto appertaining, to *Christ Church* in *Canterbury*; and for the confirmation thereof, commanded a clod of earth with all the Writings to be laid upon the Altar. Another monument hereof more ancient

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by 192.

* That the *Britons* used *Seals* appears in *Ll. Hoeli*, and no doubt the *Saxons* also did soon after their Conversion.

by the space of above an hundred years we find in that Grant of *Witbered* King of *Kent*, of four Plough-lands in the Isle of *Tbanet*, the latter part whereof this Clause concludes thus: *Ad cujus cumulum affirmationis, cespitem bujus supradictæ terre super sanctum altare posui.*

Last Will.

• *Ll. Cnuti*,
c. 58. in *Wil-*
kins, p. 144.
Pryn. Pap.
usurp. 3 *Tom.*
141, 2.

Every man had liberty to execute the Law of his Inheritance in his life-time; but some were surprized with sudden occasions, and unexpected issues and ends; and in such cases they did what they could to declare their intents by *last Will*; which by common intendment being in writing, hath occasioned some to think that the *Saxons* in their original had no use thereof, being, as they conceived, so illiterate as not to have the use of writing*. But the Character remaining to this day evinceth the contrary; nor can those words of *Tacitus*, *Et nullum est testamentum*, in any rational way be expounded in this sense, if we consider the Context, which runneth thus: *Hæredes & successores cuique liberi, & nullum est testamentum.* Which in my opinion sounds in this sense: *The Heirs and Successors to every one are his Children, and there is no testamentary power to disherit or alter the course of Descent, which by Custom or Law is settled.* Otherwise to deny them the use of all testamentary power, was a matter quite abhorring the custom of all the *Grecians*, from whom they learned all that they had. Nevertheless the *Saxons* had not been long acquainted with the *Romanists*, but they had gotten that trick of theirs also of disheriting by *last Will*, as by the testament of *Æthelwolf*, and others of the like nature, in Histories may appear.

M. Westm.
An. 817.
Malmsh. gest.
Reg. l. 2. c. 2.

Goods.

The Conveyances formerly mentioned concerned Lands and *Goods*; but if no such disposal of *Goods* were, the ancient *German* custom carried them after the death of the ancestor promiscuously, or rather in common to all the Children; but in succeeding times, the one half by the Law of *Edmond* passed to the relict of the party deceased, by force of contract rather than course of descent. After him *Edward* the Confessor, recollecting the Laws, declared that *in case any one died intestate, the Children should equally divide the Goods*; which I take to be understood with a *salvo* of the Wife's Dower or Portion. As yet therefore the Ordinaries have nothing to do with the Administration, for *Goods* passed by descent as well as Lands; and upon this custom the Writ *de rationabili parte bonorum* was grounded at the Common Law, as well for the Children as the Wife's part, according as by the body of the Writ may appear.

F.N. Br. 122.

C H A P. XLII.

Of times of Law, and Vacancy.*

• See *Ll. Hocli*
& *Ll. Sax.*
Wilkins, 131,
260, 261, 290,
&c.

SUCH like, as hath been shewed, was the course of Government in those darker times; nor did the fundamentals alter either by the diversity and mixture of people of several Nations in the first entrance, nor from the *Danes* or *Normans* in their survenue: not only because in their original they all breathed one air of the Laws and Government of *Greece*, but also they were no other than common dictates of nature refined by wise men, which challenge a kind of awe in the sense of the most barbarous. I had almost forgot one circumstance, which tended much to the honour of all the rest, that is, their speedy execution of *Justice*; for they admitted no delays, till upon experience they found that by staying a little longer they

they had done the sooner: and this brought forth particular times of exemption, as that of *Infancy* and *Child-bearing*, in case of answering to criminal Accusations. Mirror. c. 4. But more especially in case of regard of holiness of the time: as that of the *Lord's day*, *Saints days*, *Fasts*, *Ember days*; for even those days were had in much honour. Ll. Sax. c. 10. Nor only *days* but *seasons*; as from *Advent* to the *Octaves* of *Epiphany*; from *Septuagesima* till *Fifteen days*, after *Easter*, (as by the Laws of the Confessor) till *Eight days* after *Easter*; and from *Ascension* to the *Eighth day* after *Pentecost*. And though as Kings and Times did change, so these seasons might be diversly cut out, as the Laws of *Alfred*, *Æthelstan*, *Æthelred*, *Edgar*, *Canutus*, and *Edward*, do manifest; yet all agree in the season of the year, and that some were more fit for holy observation than others. And thus by the devotion of Princes, and power of the Clergy, the *four Terms* of the year were cut out for course of Law in the King's Court, the rest of the year being left vacant for the exercise and maintenance of Husbandry, and particular callings and employments; saving that even in those times the Courts of the *County* and *Hundred* held their ancient and constant course. Last of all, Mirror. cap. 4. and as a binding Law unto all, it was provided that false Judges should give satisfaction to the party wronged by them, and (as the case required) to forfeit the residue to the King; to be disabled for ever for place of judicature, and their Lives left to the King's mercy.

C H A P. XLIII.

An Epilogue to the Saxon Government.

AND thus far of the joints of the *Saxon Government* in their *Persons*, *Pre-
cincts*, *Courts*, *Causés*, and *Laws*; wherein as the distance will permit, and according to my capacity, I have endeavoured to refresh the Image of the *Saxon Commonwealth*, the more curious lineaments being now disfigured by time. Afar off it seems a Monarchy, but in approach discovers more of a Democracy, and if the temper of a body may appear by the prevailing humour towards age, that Government did still appear more prevalent in all assaults both of time and change. The first great change it felt was from the *Danes* that stormed them, and shewed therein much of the wrath both of God and Man. And yet it trenched not upon the fundamental Laws of the people's Liberty. The worst effect it had was upon the Church, in the decay of the power of Religion and the Worship of God. For after much toil and loss both of sweat and blood, the *Danes* (finding that little was to be gotten by blows but blows, and that the Clergy at the least was the side-wind in the course of all affairs) laid aside their Paganism, and joined with the Clergy: and as their Converts and Pupils, gained not only their quiet residence, but by the favour of the Clergy to make trial of the Throne; and therein served the Clergy so well, as they brought the people to a perfect Idolatry, with times, places, and persons, and subjection of their Estates to Church-Tributes. And as at Tennis, the *Dane* and Bishop served each other with the fond Country-man, that whether *Lord Dane* or *Lord Bishop* was the greater burthen, is hard to be determined. Thus became ambitious Prelacy in its full glory, and the poor Church
of

of Christ clouded in darkness, and little hold left for recovery, but only by the liberty of the *Saxon* Freeman, which the *Danes* could never conquer; not for want of will or power, but of time and occasion: For the Crown returned to the *Saxon*-line again after the half age of one man, although it was worn by three; so God would have it: nor did any monument of the *Danish* Government remain, saving a few customs in some places, which shew rather that the *Danes* were here, than that they ruled here.

Tacitus.

To sum up all; The *Saxon* Commonwealth was a building of greatest strength downward even to the foundation, arched together both for Peace and War. That by the Law of *Decenners*, wherein Justice was the bond, their Armies were gathered, not by promiscuous flocking of people, but by orderly concurrence of Families, Kindreds, and *Decenners*, all chusing their own Leaders. And so Honour, Love, and Truth conspired together to leave no man's life in danger, nor death unrevengeed.

It was a beautiful composure, mutually dependant in every part from the Crown to the Clown; the Magistrates being all choice men, and the King the choicest of the chosen: election being the birth of esteem, and that of merit; this bred love and mutual trust, which made them as corner-stones, pointed forward to break the wave of danger. Nor was other reward expected by the great men, but honour and admiration, which commonly brought a return of acts of renown.

Lastly, it was a regular frame in every part, squared and made even by Laws, which in the people ruled as *Lex loquens*, and in the Magistrate as *Lex intelligens*; all of them being grounded on the wisdom of the *Greeks*, and Judicials of *Moses*. Thus the *Saxons* became somewhat like the *Jews*, distinct from all other people; their Laws honourable for the King, easy for the Subject, and their Government, above all other, likest unto that of Christ's Kingdom, whose *Yoke is easy, and Burthen light*. But their motion proved so irregular, as God was pleased to reduce them by another way.

C H A P. XLIV.

Of the Norman Entrance.

THUS was *England* become a goodly Farm: The *Britons* were the Owners, the *Saxons* the Occupants, having no better title than a possession upon a forcible entry, with a *continuando* for the space of four hundred years: seldom quiet, either from the claim and disturbances of the restless *Britons*, or invading *Danes*; who not only got footing in the Country, but settled in the Throne; and after gave over the same to the use (as it proved) of another people sprung from the wild stock of *Norway*, and thence transplanted into a milder Climate, yet scarcely civilized. That in one Isle the glory of God's bounty might shine forth to all the barbarism of *Europe*, in making a beautiful Church out of the refuse of Nations. These were the *Normans* out of the continent of *France*, that in their first view appeared like the Pillar of the Cloud, with terrour of Revenge upon the *Danish* Pride, the *Saxon* Cruelty, and Idolatry of both people. But after

after some distance shewed like the Pillar of fire, clearing God's providence for the good of this Island, to be enjoyed by the succeeding generations. Nor was this done by Revelation or Vision, but by over-ruling the aspiring mind of Duke William of Normandy to be a scourge unto Harold for his usurpation, and unto the people for their causeless deserting the Royal Stem. Yet because the haughtiest spirit is still under fame and opinion, and cannot rest without pretence or colour of Right and Justice, the Duke first armed himself with Titles, which were too many to make one good claim; and served rather to busy mens minds with musing, whilst he caught the prey, than settle their judgements in approving of his way. First, he was Cousin-german to the Confessor, and he childless; and thus the Duke was nigh, though there were nigher than he: but the worst point in the case was, that the Duke was a Bastard, and so by the Saxon Law without the line; nor was there other salve thereto but the Norman custom, that made no difference; so as the Duke had a colour to frame a Title, though England had no Law to allow it. And this was the best flower of his Garland, when he meant to solace himself with the English, as may appear by what his Son Henry the first sets forth to the World in his Charter whereby he advanced the Abbey of Ely into the degree of a Bishoprick; and wherein, among his other titles, he calls himself Son of William the great, *Qui Edwardo Regi successit in regnum jure hæreditario.* Spicileg.

But if that came short, he had the bequest of the Confessor, who had designed the Duke to be his Successor: and this was confirmed by the consent of the Nobility, and principally of Harold himself, who in assurance thereof promised his Sister to the Duke in marriage. This countenanced a double Title, one by Legacy, M. Paris. 1. Ant. Brit. Eccles. 96. the other by Election; and might be sufficient, if not to make the Duke's title just, yet Harold's the more unjust, and to ground that quarrel that in the conclusion laid the Duke's way open to the Crown. And for the better varnish, the Duke would not be his own Judge, he refers his Title to be discussed at the Court of Rome, and so flattered the Pope with a judicatory power amongst Princes (a trick of the new stamp) whereby he obtained sentence in his own behalf from the infallible Chair. The Pope glad hereof, laid up this amongst his Treasures, as an *Estoppel* to Kings for times to come: And the King made no less benefit of as an *Estoppel* against the English Clergy that otherwise might have opposed him, and of assurance of those to him that were his friends, and of advantage against Harold, that had gotten the Crown *sine Ecclesiastica auctoritate*, and by that means had M. Paris. 2. made Pope Alexander and all the Prelates of England his Enemies.

But if all failed, yet the Duke had now a just cause of quarrel against Harold for breach of Oath and Covenant; wherein if Harold chanced to be vanquished, Hist. vit. Eadm. 5. and the Crown offered itself fair, he might without breach of conscience or modesty accept thereof, and be accounted happy in the finding, and wise in the receiving, rather than unjustly hardy in the forcing thereof. And this might occasion the Duke to challenge Harold to single Combat, as if he would let all the World know that *the quarrel was Personal, and not National.*

But this mask soon fell off by the death of Harold; and the Duke must now explain himself, that it was the value of the English Crown, and not the Title, that brought him over. For though he might seem as it were in the heat of the chase to be drawn to London, where the Crown was, and that he rather sought after his Enemies than it; yet as soon as he perceived the Crown in his power, he

he disputed not the right, although that was *Edgar's*, but possessed himself of the long-desired prey: and yet he did it in a mannerly way, as if he saw in it somewhat more than Gold and precious Stones: for though he might have taken it by ravishment, yet he chose the way of wooing by a kind of mutual agreement. Thus this mighty Conqueror suffered himself to be conquered, and stooping under the Law of a *Saxon* King, he became a King by leave; wisely foreseeing, that a Title gotten by Election, is more certain than that which is gotten by Power.

C H A P. XLV.

That the Title of the Norman Kings to the English Crown was by Election.

SOME there are that build their opinion upon passionate notes of angry Writers, and do conclude that the Duke's way and Title was wholly by *Conquest*, and thence infer strange aphorisms of State, destructive to the Government of this Kingdom. Let the Reader please to peruse the ensuing particulars, and thence conclude as he shall see cause.

It will easily be granted that the Title of *Conquest* was never further than the King's thoughts, if it ever entred therein: else wherefore did he pretend other Titles to the world? But because it may be thought that his wisdom would not suffer him to pretend what he intended, and yet in practice intended not what he did pretend; it will be the skill of the Reader to consider the manner of the first *William's* Coronation, and his succeeding Government. His Coronation questionless was the same with that of the ancient *Saxon* Kings; for he was crowned in the Abbey of *Westminster* by the Archbishop of *York*, because he of *Canterbury* was not Canonical. At his Coronation he made a solemn Covenant to observe those Laws which were *bonæ, & approbatæ, & antiquæ legis Regni*; to defend the Church and Church-men; to govern all the people justly; to make and maintain righteous Laws; and to inhibit all spoil and unjust judgments. The people also entered into Covenant with him, That as well within the Land as without, they would be faithful to their Lord King *William*, and in every place to keep with all fidelity his Lands and Honours, together with him, and against Enemies and Strangers to defend. It is the self-same in substance with the fealty that the Saxons made to their Kings, as will appear by the paralleling them both together. The Saxons were sworn to defend the Kingdom against Strangers and Enemies, together with their Lord the King, and to preserve his Lands and Honours, together with him, with all faithfulness; so as by the *Saxon* way, the Allegiance first terminated on the Kingdom, and then, as in order thereunto, upon the King, with his Lands and Honours. But the *Norman* either wholly omitted the first, as needless to be inserted in a municipal Law, itself being a Law in nature; or else includeth all within the words *Lands and Honours*, taking the same in a comprehensive sense for the whole Kingdom, and so made up the sum of the *Saxon* fealty in fewer figures. Which may seem the more probable of the twain, because little reason can be rendred why the King should restrain that defence to his private Lands (if he claimed all by *Conquest*)

Hoveden.
Radmer. Hist.
l. i. p. 13.
M. Paris. vit.
Gulielm.
Malmib. l. 3.
fol. 154.
Wigorn.
Ann. 1066.
Glossar.
ll. Gul.
Spicil. 190.

quest) whenas all equally concerned him; or why he should exclude the publick, whenas both himself and all he had was embarked therein, and it might subsist without him, but contrarily not he without it, appeareth not to my understanding; nor did the thing enter into the King's purpose, if the file of his purposes be rightly considered: For speaking concerning *Castles, Burroughs, and Cities*, which are in nature limbs of the Common-wealth, he saith that *they were built for the defence of the People and Kingdom*. Was this the service of Walls and Fortifications, and not much rather of men within those places of strength? Certainly the plain *English* is, that in time of breach of publick quiet and peace, the Subjects were bound to defend the Kingdom, and in order thereto the people of the same, and of the King's right included in the publick defence; else it were a strange conclusion, that each man in particular, and in their own personal one, was bound to defend the King's right; but being imbodyed, the Kingdom. And yet more clearly it's apparent, in that the service of the order of *Knight-hood*, which was the chief strength of the Nation in those days, was determined upon the service of the King, and defence of the Kingdom; or which is more plain, for the Service of the King in or for defence of the Kingdom; as the Statute of *Mortmain* expounds the same. But not to force the King's sense by argument; if the King had purposely omitted that clause of the Kingdom's safety, as of inferiour regard to his own personal interest; it was one of his rashest digressions, wherein he soon espied his error: for in the midst of his strong and conquering Army he held himself unassured, unless he had a better foundation than that which must change with the lives of a few at the utmost. And therefore besides the Oath of *fealty* formerly mentioned, he establish'd a Law of Association, that all *free men* should be sworn Brethren; 1. *To defend the Kingdom with their lives and fortunes against all enemies to the utmost of their power.* 2. *To keep the peace and dignities of the Crown.* 3. *To maintain right and justice by all means, without deceit and delay.* Join then these two Oaths together, viz. that of *fealty*, and this of *fraternity*; and it will easily appear, that the Allegiance of the *English* to the *Norman* Kings was no other than what might stand with Brotherhood, and tender regard of the publick above all: and differing from the *Saxon fealty* only in this, that that was in one Oath, and this in two. Wherefore whatsoever respects steered in the rear of the King's course, it is less material so long as the van was right; albeit that the sequel will prove not much different from the premises, as will appear in the foot of the whole account.

Thus entred the first *Norman* upon the *Saxon* Throne; and as he had some colour of right to countenance his course, so had his Son his Father's last Will, and yet he had as little right as he. This was *William Rufus*, that was of his Father's way, but of a deeper dye; and therefore might well be called *William Rufus*, or *William* in grain. He was exceeding happy in the fear or favour of the people, for he had nothing else to make room for his rising. True it is, he had the good will of his Father, but he was dead; and probably the people as little regarded it, as he did them. Nor was it ever observed that the *English* Crown was of so light account, as to pass by devise of *cestui que use*; and therefore though it was designed to him from his Father, yet both right and possession was left to the people to determine and maintain. The *Clergy* first led the way, having first taken a recognizance of him for his good behaviour towards them; which he assured, as far as large promises and protestations would serve the turn; and within one year after, standing in need of the favour of the *Commons* (to maintain possession

Ll. Gul. Spicil.

61.

M. Paris An.

1100, 1213.

Stat. 7 E. 1.

Ll. Guliem.

Spicil. 59.

William
Rufus.

Eadmer. Hist.

Wigorn.

M. Paris.

M. Paris.
An. 1088.

possession against his Brother *Robert*) he gave them as good security as the Clergy had; which he kept in such manner, that it was a wonder that one of so small interest in the Title, but what he had by the people's leave and favour, should rule in such manner, and yet die a King; the favour of the people being like a Meteor, that must be continually fed, or it soon goes out and falls: for evident it is, that the right of inheritance was his elder Brother *Robert's*, who was the braver man, and more experienced Soldier; and upon these principles had obtained the love of the *Norman* Barons (the flower of his Father's Chivalry) and the liking of the Clergy, after they had found by experience the emptiness of their hope in his Brother *William*; and was every way so superiour to his Brother in advantages, as we are left to believe that *William* got the day*, without any other ground, but only that God would so have it. It is true, the *English* stuck close to him; but how they were gained or contained, Writers speak not, but tell us of his promises, which also they tell us were vain, and never had issue further than would stand with his profit.

Henry first.

Math. 1100.
Eadmer.
Speed.

Math. Paris.

Exit William Rufus, and in comes his younger Brother *Henry* the first of that name; a Prince that excelled in wisdom, and by it ruled his courage, which served him so far, as his aims and ends reached: his Title was no better than his Father's or Brother's, but rather worse; for he had no colour of last Will to propound him to the people, and his elder Brother *Robert* was still alive, and by his service of the Church in the War of *Jerusalem*, might merit that respect of the Clergy, as not to permit him to be a loser by so well-deserving service, as in those days that was accounted. Nevertheless the *English* look upon *Henry* as the fitter man for their turn; being now at hand, and *Robert* at *Jerusalem*; and being a native born in *England*, civilized into the *English* garb by education; and of a wiser and fairer demeanour, and more inclining to peaceable Government, which both *Normans* and *English* were now much inclined to, as being weary of thirty years service in the Wars. And therefore it is not marvellous if they applied themselves to him in a way of capitulation, and less wonderful if he hearkened thereunto; and yet neither unadvisedly yielded unto by him, nor traitorously propounded by them, as some in zeal to Monarchy conclude the point. The worst of the whole matter resting in this, that the King bound himself to be just, that he might be great; and the people to submit unto Justice, that they might be free, like as their Ancestors were, and themselves by the Law established ought to be. For the capitulation was in substance settled by the ancient Laws of the *Saxons* mixed with some additions of Laws made by the King's Father, with the joint advice of the grand Council of the Kingdom; all which both the *Norman Williams* had often confirm'd by solemn protestations and promises; however their actions, upon sudden surprisal, were *malæ consuetudines* and *exactiones injustæ*, by this King's own acknowledgment. Thus these three *Norman* Kings made their way to the Throne; the first by Arms, under colour of Title; the second by a kind of Title, under colour of Arms; and the last by favour, but all entred the same by *capitulation*, *election*, and *stipulation*†; and for the general, had some regard to suit their course in order of retaining the good will of their people, although in a different measure, according to the differency of occasions.

* 'Twas his Courtship to the *English*, kept him on the Throne, and only his Behaviour to the Clergy that caused the Monkish Writers to draw him in the Light he appears in. See his Life and Laws in *Wilkins*.
† They all at their respective Coronations swore to govern by the ancient and approved Laws; especially the good Laws of *Edward the Confessor*. But Historians observe, *Break of Oath* was then a Royal Custom. See *Mat. Paris*, *Mat. Westmister*, &c.

See the King's Oath in the conclusion of this first part.

C H A P. XLVI.

That the Government of the Normans proceeded upon the Saxon principles; and first of Parliaments.

THE principles which I mean, are these: First, the *Legislative Power*, and influence thereof upon the whole. Secondly, the *Members* of that Government, with their several motions. Thirdly, the *Laws* and Customs, or Rules of those Motions. And first concerning the *Legislative power*. Although it be true that the first *William's* great and most constant labour was to have and to hold, and had but little time or liberty to enjoy; yet that time of rest which he had, he did apply it and himself in the settling of the Laws by the advice of *Common-council*: I say, not by advice of his own heart, or two or three *Norman Lords*, or of the *Norman Nobility* only, as some men* take the confidence to aver, as if they had been eye-witnesses to the actions of those days; but by the joint advice of the *Grand-Council* of the Lords, and wise men of the Kingdom of *England*. will not insist upon force of argument to shew, that common reason must of necessity sway the King into this course, but shall reserve that to another place; the testimonies of Writers must now serve the turn: and herein, the testimony of the Chronicle of *Litchfield* must have the first place, which speaks both of a Council of Lords; and saith, that by their advice he caused to be summoned a meeting of all the Nobles and wise men through all the Counties of *England*, to set down their Laws and Customs. This was in the fourth year of his Reign, or rather after his entry, and as soon as the Kingdom was brought into any reasonable posture of quiet; and which, besides the intention of governing the Kingdom according unto Law, doth strongly + pretend that the Parliament had the *Legislative Power* and right of cognizance, and judicature in those Laws that concerned the Kingdom in general; and for the particular Laws or Customs of several Places or Precincts, it was referred to a Committee or Jury in every County to set them forth upon Oath.

Secondly, that this Council had power to change Laws, may likewise appear in that Act made concerning the introduction of the Canon-Law, which shews not only the power of that Council in Church-matters, but also that the Canon was no further in force than the same Council would allow; and this was also done by *Common-council*, and the Council of the Archbishops, Bishops, Abbots, and all the Princes of the Kingdom; which connexion shews plainly, that there was a Council besides that of the Prelates and Princes.

Thirdly, in matters of general charge upon the whole body of the people, the King used also the help of this *Grand-council*, as may especially appear in the charge of *Arms* imposed upon the Subjects; which was said to be done by the *Common-council* of the whole Kingdom; as is witnessed even by the King's own Law. It may seem also, that the *grand Officers* of the State were elected by such grand assembly of the wise men; for we find that *Lanfrank* was elected to the See of *Canterbury* by the assent of the Lords and Prelates, and of the whole people, that is, by the Parliament of *England*; and as probable it is, that Bishops were therein also elected, for that the Bishop of *Lichfield* resigned his Bishoprick in such like Assembly, if the meaning of *Lanfrank* be rightly understood, who saith in his Letter, that it was in *conventu Episcoporum atque Laicorum*.

L 2

Lastly,

Spicileg. p. 5.
See Wilkins,
p. 216. &
Chron. Lichf.
Ibid. citat.

+ i. e. infer.

Spicil. 167.
Fox. Mart.

l. 4.

ll. Gulielm.
c. 58. Spicil.

Antiq. Brit.
fol 110.
Vide ante c.
23. Lex Parl.
43.
Baron. Annal.
An. 1070.

II. Gulielm.
c. 55.

* i. e. Mat.
Paris, &c.

† See his Hist.
Wilkins, p.
295, &c.

|| See the Notes
on the prece-
dent chap.

§ See his Hist.
Wilkins, 297
and Law, ib.
233, &c.

Bede Hist. 1.3.
c. 30.

Lastly, that one Law of the Kings, which may be called the first *Magna Charta* in the *Norman* times, by which the King reserved to himself from the *free-men* of this Kingdom nothing but their *free service*, in the conclusion saith that their Lands were thus granted to them in inheritance of the King by the *Common-council* of the whole Kingdom; and so asserts in one [Sentence] the liberty of the *free-men*, and of the *representative* body of the Kingdom. These footsteps of the Parliament find we in the Conqueror's time, besides other more general intimations scattered amongst the Historians*; which may induce opinion to its full strength, that this King, however Conqueror he was, yet made use of this additional power of Parliament to perfect his designs; and it may be, more often than either of his Sons, that yet had less pretence of superlative power to countenance their proceedings.

William Rufus was a man of resolution no whit inferiour, if not surpassing his Father; and had wit enough for any thing but to govern his desires, which led him many times wild, and might occasion conceit that he was almost a mad King, though he were a witty man; and therefore it is the less marvel if he used not the help of the *Common-council* more than needs must; where Kings many times are told of that which they are loth to know. Nevertheless *William* the second could not pass over thirteen years without a parly with his || Commons and Clergy, unless he meant to adventure a parley between them and his Brother *Robert*, who like an Eagle eyed his posture, though he hovered afar off.

But *Henry* the first was more wise, and being trained up even from the Cradle in the *English* garb, moralized by Learning, and now admitted into the Throne, found it the wisest course to apply himself to the rule of an § *English* King, viz. To win and maintain the good opinion of the people, by consorting together with them under one Law; and pledging himself thereto, by taking unto Wife one of the *English* Blood-royal: by this means he re seized and reassumed the *English*, in partnership with the *Norman* in their ancient right of Government; and reconciled the minds of the people, under a likely hope of enjoying a settled Government. Nor were they greatly deceived herein, for his course was less planetary than that of either of his predecessors; and yet we find little said of his parley with his people in a Parliamentary way**, although more of his Laws than any of his predecessors. The reason will rest in this, that the Writers of those times touch more upon matters of ordinary than political observation, and regarded rather the thing, than the place or manner how. The Laws therefore, although they are not entituled as made in Parliament, yet in the continuation of the History of *Bede*, it is noted that the King renewed or confirmed the ancient Laws in *Concilio peritorum & proborum virorum regni Angliæ*; which may give sufficient cause to suppose, that he declined not the ancient way, no more than he did the ancient Law.

** Note, About the sixth Year of his Reign, his Brother *Robert*, being returned from the Holy Land, came into England, where almost all the *Norman* Nobility joined with him. Whereupon *Henry* called a Parliament of the *English* only, as appears by his speech to them at the opening thereof; which see in *Mat. Paris* 42, and in *Bobun's* *Lex Parl.* 36, 37, &c. Which has this remarkable Conclusion, *Si Fortitudo Anglorum roborer, inanes Normannorum iras nequaquam censio Formidandos*. Where may be also seen the King's Oaths and Assurances to the *English*, for granting to them the *Magna Charta* of *Englishmen's* liberties, i. e. the Laws of *Edward* the Confessor: which implicitly gave them the Right of electing all their *Magistrates* and *Officers*, civil, military, and ecclesiastical. See *Lex Parl.* 43, 44, &c.

Of the Franchise of the Church in the Normans time.

THE Canon-Law, that ever since *Austin's* coming, like Thunder, rumbled in the Clouds, now breaks forth with confusion to all opposers. It had formerly made many fair proffers of service to this Island, but it was disaccepted, as too stately to serve; yet by often courtesies received, it was allowed as a Friend afar off. For the vast body of the *Roman* Empire, like a body wasting with age, died upward, and left the *Britons* to their own Laws, before the second Beast was grown; which being young, was nourished under the Imperial Law of the first Beast, till it grew as strong as its Dam, and began to prey for itself. The Empire perceiving its grey hairs, and the youthful courage of this Upstart, was glad to enter mutual League with it, That to maintain the *Ecclesiastical Monarchy*, and This again to support the *Imperial*: and so became the Canon and Imperial Law to be united, and the Professors to be *utriusque juris*. But this parity continued not long; the young Beast looked like a Lamb, but spake like a Lion: and contrarily, the Eagle had cast its Feathers, and could towre no more; so as by this time the Pope was too good for the Emperor, and the Canon-Law above the Imperial; yet allowing it to serve the turn: and so the Professors of both Laws became Students in the Civil, but Practisers of the Canon. This Composition thus made beyond the Seas, the great work of the Papacy was how to transport it over into this Isle: for the Emperor could entitle the Pope to no power here, because none he had. *Austin* the Monk undertakes the work; he offers it to the *Britains* under the goodly Title of Universal Bishop: but they kept themselves out of Canon-shot. The *Saxons* allowed the Title, but liked not the power; the Monk observed the stop, and left time to work out that which present cunning could not, being content for the present that a League of Cohabitation should be made between the two Swords, Ll. Edw. c. 3. though the spiritual were for the present underling; not despairing that it would work out its own way over the *Saxon* Law, as it had done over the Imperial. Nor did his conceit altogether fail: for the *Saxons* by little allowed much, and the *Danes* more; although the main was preserved until the *Normans* came upon the Stage, who made their way by the Pope's leave, and gave him a colour of somewhat more than ever any of their *Saxon* predecessors had done; and to gain the more quiet possession of the Crown to themselves, allowed the Pope the honour of their Council learned to draw the Conveyance: which, as some think, was made advantageously for the Pope himself in point of tenure, but more probably in the Covenants. For the Conqueror was scarce settled in his seat, but the Canon-Law began to speak in the voice of a Royal Law: First complaining of misgovernment, Spicil. 167. as if the Church were extremely wronged by having the same way and Law of Fox Mart. 14. Tryal with the Commons of *England*; and then propounds four several Expedients, enough to have undone the whole Commonwealth in the very entrance, had not the superstition of those times blinded both Parliament and People, and rendered them willing to that, which their successors in future ages often repented of.

No offence against the Bishops Laws, shall be handled in the Hundred.

By the *Saxon* Law, Church-matters had the preheminence both in the Hundred

dred and in the County; and it was the Bishop's duty to join with the Sheriff in those Courts, to direct and see to the administration of Justice; and yet the Canon had been above three hundred years foregoing in the Negative.

No Case concerning the Regiment of Souls, shall be brought before the Secular Judge.

The Regiment of Souls was a common place sufficient to contain any thing that was in order thereunto; and so every one that hath a Soul, must be no more responsible unto the temporal Judge for any matter concerning it, but unto the Ecclesiastical power: And this not only in case of scandal, as against the moral Law or Rule of Faith; but for disobedience done to the Canons, made afar off, concerning any gesture or garb that may come within the favour of an Ecclesiastical conceit.

That all Delinquents against the Bishops Laws, shall answer the Fact in a place appointed by the Bishop to that end.

So as now the Bishop hath gotten a Court by the Statute-Law; that had formerly no other Cards to shew but that of the Canon; and a Court of such place as the Bishop shall appoint, however inconvenient for distance or uncertainty it be.

That the tryal of such matters, shall be according to the Law of the Canon, and not according to that of the Hundred.

That is, not by Jury, but by Witnesses, in a clandestine way, if the Bishop please: or without any Accuser, or by mere scrutiny, or any other way that may reserve the Layman to the breast of a prepossessed spirit of the spiritual Judge. And thus the poor Country-man is exposed to the censure of an unknown Law, in an unknown Tongue, by an unknown way; wherein they had no footing, but by an implicit Faith. And herein the providence of God (I imagine) was more manifest than the Wisdom of Man, which was too weak to foresee events at so great a distance: for questionless it was a point of excellent wisdom, for the People (now under a King of a rugged nature, that would not stick to catch whatsoever he could get) to deposit part of their Liberties into the hands of the Clergy; from whom moderation might be expected, as from Friends and Neighbours, and (as Partners in one Ship) mutual engagement to withstand the waves of Prerogative of Kings, that seldom rest till they break all Banks, and sometimes over-reach their own Guard, and cannot return when they would. And thus it fell out: for many times the Pope and Clergy became Protectors of the peoples Liberties, and kept them safe from the rage of Kings, until the time of restitution should come; and became not only a Wall of defence to the one, but a Rock of offence to the other. For the Triple-Crown could never solder with the *English*, nor it with that; the strife was for Prerogative, wherein, if the Clergy gained, the Crown lost; and no moderation would be allowed. For the conquering King was scarce warm in his Throne, whenas the Pope demanded Fealty of him for the Crown of *England*; and the King's own good Archbishop and Friend *Lanfrank* delivered the Message; as also *Anselm* did afterwards to *William Rufus*; which though these Kings had courage enough to deny, yet it shewed plainly that the Popes meant no less Game than *Crown-glieke* with the King and People; the Archbishops and Bishops holding the Cards for the Pope while in the interim he oversaw and directed all. The *Norman* Kings thus braved, paid the Popes in their own Coin, and refused to acknowledge any Pope, but such as were first allowed by their concurrence.

Spicil. 164.
Baron. Annual.
An. 1068.

Eadmer. Hist.
l. 1. p. 25.

Thus have we the second bravado of the Canon-Law; for as yet it was not so fully entered, as it seemed. The words of the Act of Parliament, it's true, were general; yet their sense was left to time to expound, and the course of succeeding affairs nevertheless passed with a *non obstante*. For whereas in those days the Clergy claimed both Legislative and Executory power in Church-matters, the Normans would allow of neither, but claimed both as of right belonging to the Imperial power of this Island, originally and only. As touching the Legislative power, it is evident, that notwithstanding the Canon that had long before this time voted the Laity from having to do with Church-matters; yet the Norman Kings would neither allow to the Metropolitans the power of calling Synods nor such meetings, but by their leave, although it was earnestly contended for. Neither could the Clergy prevail to exclude the Laity out of their Synods, being assembled, nor from their wonted privilege of voting therein; albeit that for a long time by Canon it had been contradicted. The differences between the Clergy and the Kings concerning these and other matters, grew so hot, that Kings liked not to have any Synods or Meetings of publick Council; and Archbishop *Anselm* complained that *William Rufus* would not allow any to be called for thirteen years together: Which by the file of story, compared with that Epistle, made up the King's whole Reign. And this was questionless the cause that we find so little touch upon Parliamentary Assemblies in the Norman times, Kings being too high to be controuled, and Bishops too proud to obey: but necessity of State, like unto Fate, prevails against all other interests whatsoever; and the wisdom of *Henry* the first in this prevailed above that of his predecessors, as far as their Will was beyond his. For it was bootless for him to hold out against the Church that stood in need of all sorts to confirm to him that which common Right (as then it was taken) denied him; and therefore (though it cost him much trouble with *Anselm*) he re-continued the Liberty of publick Consultations, and yet maintained his Dignity and Honour seemly well. I shall not need to clear this by particulars; for besides the publick Consultations at his entrance, and twice after that, for supply or aid for his Wars, and the marriage of his Daughter with the Emperor, it is observed that the Archbishop of *Canterbury* summoned a Council at *Westminster*, but it was *Authoritate Regia*, and that there assembled *magnæ multitudines Clericorum, Laicorum, tam divitum quam mediocrium*; and that upon the third day the Debate was *de negotiis secularibus nonnullis*. The issue of all was, that some things were *determinata*, others *dilata*, and other matters *propter nimium æstuantis turbæ tumultum ab audientia judicantium profligata*. Out of which may be probably concluded, 1. That the Laity as yet were present in Councils with the Clergy. 2. That they were all in one place. 3. That they all had votes, and that the major number concluded the matter. 4. That certain persons used to determine of the major number by the hearing, and that the Votes were still *clamore non calculis*. 5. That they held an Order in debating of affairs, *viz.* on some days Ecclesiastical, and other days Secular. 6. That all matters concluded, were attested by the King, who, as 'tis said, did give his consent, and by his authority did grant and confirm the same. And upon the whole matter it will be probable, that as yet Councils, and those now called * Parliaments, differed not in kind, although possibly there might be difference of names, in regard that some might be immediately and mainly occasioned and urged by Temporal Exigences, and others by Ecclesiastical; but whether

Radmer. Hist. p. 6. & 24. Spicil. 163.

Epist. ad Pascal. p. p.

Content. Wigorn. An. 1127.

Councils were then as Parliaments now.

whether Temporal or Ecclesiastical the first occasion was, yet in their meetings they handled both as occasion offered itself.

Ll. Gulielm.
c. 20.
Spicil. 180.

Eadmer. Hist.
p. 6.
Ll. H. 1. c. 5.

* i. e. the Bi-
shops.

Eadmer. Hist.

l. 2. p. 53.

& l. 3. & l. 4.

Eadmer. Hist.

l. 1. & l. 5.

Wigorn.

An. 1128.

Spicil. 142.

Lex. Parl.

43. 44. &c.

Secondly, as the Clergy could not attain the sole Legislative power, so neither had they the sole Juridical power in Ecclesiastical Causes: for not only in case of error in the Ecclesiastical Courts was an Appeal reserved to the King's Court, as formerly in the *Saxons* time; but even those things which seemed properly of Ecclesiastical cognizance, were possessed by the King's Court in the first instance, as that of *Peter-pence*, which was a Church-tribute, and might be claimed to be properly of the Church-cognizance much rather than Tythes: and yet by the Law of this Kingdom in the Conquerour's time, it is especially provided, That defaults of payment of that duty shall be amended in the King's Court, and a fine for default was given to the King, albeit that the Bishop was made the Collector, and the Pope the Proprietor. And many other particulars, which were holden to be of Ecclesiastical cognizance, Kings would draw them within the compass of *maintaining the peace of the Church*, which properly belonged to them to defend; and so had the cognizance of them in their own Courts, and fines for invasion of the Church-rights. But because this may seem but colourable, and by way of flattery of the Churches right, and not in opposition thereof; in other things it will appear plainly that Kings were not nice in vindicating their own claim in matters which the Clergy held theirs *quarto modo*; as namely in the case of *Excommunication*, a Weapon first fashioned by the Church-men, and in the exercise whereof themselves were in repute the only Masters; and yet in this were mastered by Kings, whose Laws directed and restrained the swelling of that censure, and made it keep measure; whose Tenants and Officers and Servants must not be meddled with by this censure, but by the King's leave; nor must they be called to answer but in the King's Court. That Right still remained to them after the spoil made by the Hierarchy upon the Rights of all the rest of the *Free-men*, and therefore could not of right be called *nova* in the Historians sense; seeing that it was no other than the ancient custom used amongst the *Saxons* before that the Clergy had either purpose or power to reach at such a height as afterwards by degrees they attained unto. Furthermore, the Hierarchy, as they neither could possess the Legislative nor Juridical power in Church-matters, so neither could they possess themselves: for as yet they were the King's men, and the more the King's men, because they now think a Bishoprick but a naked commodity, if not robed with a *Barony*. Nevertheless before that ever they knew that honour, whatever the Canon was for their election, yet both their Title and Power *de facto* was derived to them from the Kings, who also invested them with Staff and Ring; nor had the Pope as yet (though he had conquered the Hierarchy) possessed himself of their colours: but during all the *Norman Times*, the Kings maintained that trophy of the right they had from their Predecessours, notwithstanding the many assaults from *Rome*, and treacheries of the Cathedrals * within the Realm. And albeit sometimes Kings were too weak to hold the shadow, yet the convention of the States did maintain the substance, viz. the right of Election without intermission, as the Examples of *Lanfrank* unto the See of *Canterbury*, and *Anselm* and *Ralph* his successors, and of *Thomas* into the See of *York*, and *Ralph* Coadjutor to *Thur-*
Wigorn. *stan* Archbishop of the same See, and of *Gilbert* into the See of *London*, besides others, do sufficiently set forth. Whether it was because the convention of States was more stout, or that the Bishops now wedded to Temporal

poral *Baronies*, were so unquestionably interested in the publick affairs of the Commonwealth, that it was against common sense to deny the States their vote and cognizance of their Election, I cannot determine; yet it is a certain truth, the more *Baron* the less *Bishop*, and more unmeet for the service of *Rome*: Politickly therefore it was done by Kings to hold these men by a Golden hook, that otherwise had prostituted themselves to a foreign power, and proved absolute deserters of their Countries Cause, which they now must maintain under peril of the loss of their own honour.

In the next place, as they were the King's men, so their Bishopricks and Diocesses were under the King's power to order, as by the advice of the Bishops and Baronage should be thought most convenient; either to endow another Bishop with part thereof, and so make two Diocesses of one, as befall in the case of the Diocess of *Lincoln*, out of which the Diocess of *Ely* budded in the time of *Eadm.* 1. 4. *Henry* the first; or to endow a Monastery or other Religious foundation with part, *P. 95, 96.* and exempt the same from all Episcopal or ordinary jurisdiction, as in the example of the foundation of the Abbey of *Battel* in *Suffex*, in the time of *Wil-* *Spicil.* 165. *liam* the Conqueror, may appear.

Lastly, whatever the first intention of this recited Statute were, it may probably be judged, that it was but a noise to still the Clergy; and that it never had more than a lifeless shape, not only in regard of the before mentioned particulars, but especially in regard of that subservient Law of *Henry* the first concerning the County-Court, which reciteth it as a custom in his time used, that the Bishop *Ll. Hen. 1. c. 7.* and Earls, with other the chief men of that County, were there present as Assistants in directory of judgment. And that in order are handled first, *matters of the Church*: Secondly, *Crown-pleas*: Thirdly and lastly, *Common-pleas*. However therefore the Kings spake fair, they either acted not at all, or so coolly, as the current of the custom was too strong; but most probable it is, that the Kings spake fair till they were settled in their Thrones, and afterwards pleased themselves: for by the general thread of story, it may appear that the Clergy in those times were more feared than loved, and therefore ridden with a strait Rein. The Prelacy on the contrary grew unruly, yet too weak for the rugged spirits of the *Norman* Kings; they are glad to be quiet, and the Pope himself to drive fair and softly, as judging it expedient *Potestatem Regalem mitius tractandam*, and continued that course and posture till the calmer times of *Henry* the first; wherein they mended their pace, and got that without noise which they had long striven for, *Greg. Epist. 1. 9. Edamer. Hist. 1. 4. P. 95. 1. 9.* viz. the preheminance and presidency in the Synods, though the King himself present; and (if the Historian writeth advisedly) the whole ordaining, or Legislative power, for so runs the stile or phrase of the Author. *Archiepiscopi & Episcopi statuerunt in presentia Regis*, as if the presence of the King and his Barons and People, were but as a great *Amen* at the Common-prayer (after the old stamp) to set a good colour upon a doubtful matter, to make it go down the better. How the Kings brooked this draught, I cannot say; but it hath made the Kingdom stagger ever since, and it may be fear'd will hardly recover its perfect wits, so long as the brains of the Clergy and the Laity thus lie divided in several Cells.

CHAPTER XLVIII.

Of the several subservient Jurisdictions by Provinces, Marches, Counties, Hundreds, Burroughs, Lordships, and Decennaries.

HAD the Normans owned no other Title than that of Conquest, doubtless their mother-wit must needs have taught them the expediency of preserving the particular *subservient Jurisdictions* of the Kingdom entire and unquashed, if they regarded either the benefit of their Conquest, or reward of their Partners or Allies; unless it should be allowed unto Conquerors to be more honourable for them to do what they will, rather than what is meet. But hereof there is no cause of question in this present subject; for nothing is more clear than that *Wales* enjoyed in the Conqueror's time, and for ages after him, its ancient Liberties, Tribute excepted: nor did Conquest ever come so nigh to their Borders, as to trench upon the Liberties of their *Marches*. For as it had been a piece of State-nonsense to have holden two sort of people under conquest, and their *Marches* in freedom; or to preserve them in good neighbourhood by *Marches*, which by the Law of Conquest were made one: so was it no less vain, if all had been once subdued by conquest, to have raised up the Liberties of the *Marches* any more.

County-courts.
Radmer Hist.
l. 4. p. 96.

ll. Hen. 1.
c. 6.

ll. Gulielm.
c. 41, & 42.
ll. Gulielm.
cap. 64.

Ibid. c. 64.

ll. Hen. 1.
c. 7.

And as they had less cause to have invaded the bounds and ancient limits and partitions of the *Counties*, so, questionless, had they so done, they would have taken the old course of the *Mickle-mote*, as they did divide the Diocess of *Lincoln* into two Diocesses, by advice of the Bishops, Princes, and other wise and holy men, and turned the Abbey of *Ely* into a Bishop's See. But it was their wisdom to preserve the ancient Land-marks; and no less both wisdom and care, to continue their due Privileges and Interests to each. Every county had its Court, and every Court its wonted Jurisdiction: no complaint must be to the King's Court, if right may be done in the County; no distress must be taken but by Warrant from the County, and that must be after complaint thrice made. The County-court must be called as our Ancestors have appointed: Such as will not come as they ought, shall be first summoned, and in case of default distrained; at the fourth default, the Complainant shall be satisfied out of the distresses so taken, and the King also for his Fine. These are the express Laws of the Conqueror's own establishment; the last of which also *Hen. 1.* confirmed by another express Law, saving that he would allow but of two Summons and two Distresses, before execution. And as it was one principal work that he undertook to reduce the Laws into course, which had been intermitted during the violent times of his Father and Brother, (the first of whom never had liberty for reformation, and the latter never had will) so amongst other Laws he settled those concerning the County-court: namely, 1. That the Bishops, Earls, and chief men, should be present for direction. 2. That it should be holden once each month. 3. That the Church-matters should precede, and then the Crown-pleas. And lastly the Common-pleas; besides some other particulars concerning pleading, and proceedings in the handling of Causes. Neither were these Causes of a petty regard only, but of greatest concernment: one example I shall remind the Reader of, and not recite *in terminis*, but refer to Mr.

Selden's

Selden's own Pen. The occasion was this: *God, the Conqueror's Half-Brother*, Spicil. 197.
 was by him made Earl of *Kent*, and therewith had the gift of a large Territory in
Kent; and taking advantage of the King's displeasure at the Archbishop of *Can-* Stigand.
terbury, possessed himself by despoil of divers Lands and Tenements belonging
 to that See. *Lanfrank* the succeeding Archbishop being informed hereof, peti-
 tioned to the King that Justice might be done him *secundum legem terra*: and the
 King sends forth his Writ to summon a *County-Court*. The Debate lasted three
 days before the *Free-men* of the County of *Kent*, in the presence of many chief
 men, Bishops and Lords, and others skilful in the Laws; and the Judgment pas-
 sed for the Archbishop *Lanfrank* upon the Votes of the *Free-men*. This *County-*
Court was holden by special summons, and not by adjournment, as was allowable
 by the *Saxon Law* upon special occasions: And this Suit was originally begun and
 had its final determination in the *County-Court*, and not brought by a *Tolt* out of
 the Hundred-court, as is supposed by an honourable Reporter; not by the anci-
 ent Laws could the Suit commence in the Hundred, because the Lands and Te-
 nements did lie in several Hundreds and Counties. The upshot of all is, that
 the *County-Courts* in those days were of so great esteem, that two of the greatest
 Peers of the Realm, one a *Norman*, the other an *Italian*, did cast a Title
 in fifteen Mannors, two Townships, with many Liberties, upon the Votes of the
 Free-holders in a *County-Court*, and that the Sentence was allowed and commended
 by the King, and submitted to by all.

In the next place we are to come to the *Hundred-courts*, of which there are by *Hundred-*
 the *Normans* allowed two sorts; the first whereof was holden twice a year: *Court.*
 This was formerly called the *Torn*, and was the Sheriff's Court; hereof little
 notice is taken, saving that by the Laws of *Henry* the first its work seems to be Ll. Hen. 1.
cap. 8.
 much designed to the view of free pledges. But the more ordinary Court, is
 that which belongs to the Lord of the Hundred, unto whom also belong the Fines Ll. Gulielm.
cap. 41.
 in cases there concerned. *This Court is to be holden once in each month; and no Suit*
to be begun in the King's Court, that regularly ought to begin in the Hundred. No Dis- Ll. Hen. 1.
cap. 7.
tringas shall issue forth till three demands made in the Hundred. And three Distresses Ll. Gulielm.
cap. 41.
shall then issue forth; and if upon the fourth the party appear not, Execution shall be by Ll. Gulielm.
cap. 42.
sale of the Distress, and the Complainant shall receive satisfaction. Ll. Hen. 1.
cap. 64.

But by the latter Laws of the same King, there are but two Summons allowed,
 and then two Distresses; and in case no appearance be, Execution shall be for
 the Complainant, and for the King's Fine.

Lastly, as the case concerned either persons or places, sometimes they used to join Ll. Hen. 1.
cap. 7.
 several Hundreds together into one Court: but this was by special Commission or Writ.

As touching inferior Courts of Towns and Mannors, there's little observa- Courts of
Towns and
Mannors.
 tion to be had, being of too private a regard to come into fame in those rough Ll. Hen. 1.
cap. 7.
 times: yet in *Hen.* the first's Laws it is ordered that *Town-courts* should meet every
 month, and that Lords should hold Pleas either in their own persons, or by their
 Stewards; and that the chief man in the Township, with four other of the chief-
 er sort, and the Minister or Town-Priest, should join their assistance in that work.
 But in nothing more did the *Norman Kings* shew their paternal love to the Com-
 monwealth, than in the Law of Pledges or *Decenners*: for as of all other Beauties, Decenners.
 this suffered most blemish from the storm of the *Norman Invasion*; so was it their es-
 pecial care to renew the life thereof, not now amongst the Natives only, but joining
 the *Normans* to the *Saxons* in the same bond of Brotherhood, utterly drowned
 there-

thereby all memory of Lordly power; and so of divers peoples making one, conquered even Conquest itself, if any were, and made all joint-partners in one common Liberty.

Li. Gulielm.
cap. 64.
Li. Hen. 1.
c. p. 8.

Every Free-man must be under Pledges to satisfy the Justice, in case of delinquency. Over every nine persons under Pledges, there must be one man in Authority, (i. e. a chief Pledge.)

View of free Pledges must be, to see that the Decennaries be full; and if any be departed, to enquire the cause: and if any be come in, whether he be under Pledges or not.

And thus the Norman Kings had their People under treble guard: one of Fealty, the other of Association, and the third that of Pledges; and all little enough to secure that which they in their own Consciences might have some cause to question whether it belonged to them or not.

C H A P. XLIX.

Of the Immunities of the Saxon Free-men under the Norman Government.

THE freedom of an English-man consisteth in three particulars: First in ownership, of what he hath: Secondly, in voting any Law, whereby that ownership is to be maintained: and Thirdly, in having an influence upon that judicatory power that must apply that Law*. Now that the English under the Normans enjoyed all this freedom unto each Man's own particular, besides what they had in bodies aggregate, may appear, as followeth: The Free-men of England were such as either joined in the War with Harold against the Normans; or such as absented themselves from the way of opposition or enmity, and were either waiting upon their own affairs, or siding with the Normans. And questionless all the sadness of the War befel the first sort of the English, whose Persons and Estates (to make the ways for the first Norman William regular and of one piece) never fell so low as to come under the Law (or rather the Will) of Conquest; but in their worst condition were in truth within the directory of the Law of forfeiture for Treason against their Sovereign Lord, whose claim was by Title, as hath been already noted. The other sort either did appear to be the Normans friends, or for aught appeared so were: and so never offending the Law, never suffered any penalty: but held their persons and possessions still under the patronage of Law, as anciently they and their Ancestors had done. And that this was the Normans meaning, they published the same to the World in a Fundamental Law, whereby is granted, That all the Free-men of the whole Kingdom shall have and hold their Lands and Possessions in hereditary right for ever.

Li. Gulielm.
cap. 55.

And by this being secured against forfeiture they are further saved from all wrong by the same Law; which provideth,

That they shall hold them well or quietly, and in peace, free from all unjust Tax, and from all Tallage, so as nothing shall be exacted nor taken, but their free service which by right they are bound to perform.

This is expounded in the Laws of H. 1. cap. 4. That no Tribute or Tax shall be taken, but what was due in the Confessor's time.

Under

Under the Word *Tax* is understood *monetarium commune per civitates & comitatus*; so as aids and escuage are not included, for they are not charged upon Counties and Cities, but upon Tenures in Knight-service; nor was *Danegelt* hereby taken away, for that was a Tax in the Confessor's time, and granted by Parliament.

So then the Norman Kings claimed no other right in the Lands and possessions of any of their Subjects, than under and by the Law or common right; and they conclude the Law with a *sicut*, which I thus English, *As it is enacted to them*, (or *Statutum est eis* agreed by them) and unto them by us given and granted by the Common-council of our whole Kingdom. I leave the words to be criticised upon as the Reader shall please; being well assured that the most strained sense can reach no further than to make it sound as an Estoppel or Conclusion to the King and his Successors to make any further claim unto the Estates of his Subjects than by Law or Right is warrantable; under which notion *Conquest* never did or can come, as shall more fully be manifested hereafter. But the right genius of this Law, will also more evidently appear by the practice of those times, which, even when Justice itself did most importune, so tenderly regarded the liberty of mens Estates, that no Distress could issue without publick Warrant obtained; and upon three Complaints first made, and right not done. And when Rape and Plunder was in the heat, and men might seem to have no more right than they had power to maintain; yet even then this Law was refuge sufficient for such as were oppressed; and was pleaded in bar against all usurpations and intrusions under pretext of the Conqueror's right whatsoever; as by the Case of *Edwyn* of *Sbarneburn* may appear. Secondly, the Freemen of England had vote in the making of Laws, by which *meum* and *tuum* was bounded and maintained, as may appear by what hath been already said; nor shall I endeavour further therein. Thirdly, they had an influence upon the judicatory power: For first, the matter in fact was determined by the votes of the *Freemen*, as the Laws of the Conqueror, and of *Henry* the first, do sufficiently manifest. Secondly, they had an influence in the making of the Sheriff, who, as well as the Bishop, was by Election of the people. Thirdly, they had an influence upon all Judges, by setting a penal Law upon them in case of corruption; which if not so penal as to take away life, was nevertheless penal enough to make an unjust Judge to be a living pattern and example of misery, to teach others to beware.

Two things more must be added, though somewhat collateral to this purpose. Concerning the right of the *Freemen* in the common *Mint*, and in their *Villains*. Concerning the *Mint*, that the *Saxons* having made it as parcel of the demesnes of the Kingdom, and leaving to the King only an overseership, reserved the controul and chief survey thereof to the grand Council of the Kingdom, who had stated the same in the *Confessor's* time. But after him the *Normans* changed the current according to their own liking, till by *Henry* the first it was reduced into the ancient course, allowing no money but such as was current in the days of the *Confessor*, whose Laws also (with some alterations by the Conqueror, with common advice) he also established. Concerning the Lords right to their *Villains*, it is observable, first, that liberty of enfranchisement was allowed; which could never have been, had not the Liberty of the Subject been saved. Secondly, that *Infranchisement* properly is the work of the people, or the body; and the Lord was to deliver

Statutum est eis & illis à nobis datum & concessum per commune concilium totius Regni Nostri.

Ll. Gulielm. c. 42, & 45.

Gloss. 227. Camb. Brit. Norff.

Vide ante. Ll. Gulielm. c. 15.

Ll. Æthelst. c. 6. Ll. Æthelst. c. 22.

Ll. Hen. 2.

Ll. Gulielm. c. 65, & 66.

deliver his *villain* by his right hand unto the Sheriff in full County-court, and pronounce him free from his Service; and shall make room for him by free passage and open doors, and deliver him free Arms, viz. a Lance and a Sword, and then he is made a *Freeman*, as I conceive, to all intents and purposes. Other-
 Ll. Gulielm. wise there might be *manumission*; as if the *villain* remained in a City, Borough, cap. 66.
 walled Town, or Castle, by the space of a year and a day, and no claim made to his service by his Lord, he shall be thenceforth free from the service of his Lord for ever: and yet this *manumission* could not conclude any but the Lord, and his Heirs or Assigns; nor could it enforce the Body to allow that for a Member, which was none before. Thirdly, that notwithstanding they allowed the
 Ll. Gulielm. Lords liberty of *infranchisement*, yet would not they allow them free liberty of 65.
 disposing them as other Chattels: nor by the Law of the Conqueror might they sell their *Villains* out of the Country, or beyond Sea; for the King had right to the mediate service of every *Villain*, though the Lord had the immediate; and therefore that Law might hold in force: nevertheless the Ordinance that *Anselm* made, that no Lord should sell his *Villain*, they would never allow for a Law, nor did it hold in force.

CHAP. L.

A recollection of certain Norman Laws concerning the Crown, in relation to those of the Saxons formerly mentioned.

I Call them *Norman Laws* because they were allowed by them, or continued in force, although many of them had their original from the *Saxons*.

First and second Commandments. One God must be worshipped, and one Faith of Christ maintained throughout the whole Kingdom.

1. This is found amongst the Laws of King *William* published by Mr. *Selden*,
 Ll. Gulielm. and was for substance in the *Saxons* time, saving that we find it not annexed to cap. 51.
 the Crown summarily until now; so as by this Law *Heresy* and *Idolatry* became
 Ll. Hen. 1. Crown-pleas. And the like may be collected concerning *Blasphemy*, concerning 6. 75.
 which it is said, as of the Servant's killing his Lord, that it is unpardonable: nor could any man offend herein, but it endangered his whole estate. The trial of these crimes is not found particularly set forth. It might possibly be in the meeting of the Clergy, and possibly in the County-Court of the *Torne* where the Bishop was present *Jure divina edocere*.

2. *Peter-pence, Ciricksceat (or Church-shot) and Tythes must be duly paid.*

These are all *Saxon Laws* united to the cognizance of the Crown, as formerly hath been shewed: Only the first *William* especially provided, that in case any
 Ll. Gulielm. man worth Thirty pence in Chattels did pay four pence for his part, it should be c. 18. & c. 20.
 Ll. Hen. 1. sufficient both for himself and his Retinue, whether Servants or Retainers; and de- cap. 10.
 faults in payment of these duties were finable to the King.

Invasion upon the right of Sanctuary fined.

3.

This I note, not so much in relation to any such Law among the Saxons, as to the future custom, which now began to alter, according to the increase or wane of the Moon. I do not find this misdemeanour to be formerly so much taken to heart by the Crown; nor possibly would it have been at this time, but that the King must protect the Church, if he meant to be protected by it: and it was taken kindly by the Church-men, 'till they found they were able enough to defend their own right by themselves. Amongst all the rest of Church-rights this one especially is confirmed, Viz. *That any Delinquent shall have liberty of Sanctuary to enjoy both Life and Member, notwithstanding any Law to the contrary.* This privilege was claimed by the Canons; but it must be granted by the Temporal power, or else it could not be had: and though it be true the Kings formerly did by their Charters of foundation grant such privileges in particular; yet could not such Grants create such immunities contrary unto, or notwithstanding any publick Law of the Kingdom; and therefore the Monasteries had their foundations confirmed by Parliament, or general assembly of wise men, if the first foundation was not laid thereon.

Ll. Gulielm. cap. 1.

Working upon the Feast-days punished by Fine.

4. Commandment.

Before this time no days for Solemn Worship of God were acknowledged by the Law of the Kingdom but the Lord's days. By this all days celebrated or instituted by the Church for that purpose are defended by the civil power, and breach of the holy observation of these days made enquirable, and punished amongst other pleas of the Crown.

Ll. Hen. 1. c. 19.

Breach of the Peace, Bloodshed, and Manslaughter punished by Fine.

6. Commandment.

This was the ancient Law of the Saxons, and was continued without alteration till about Alfred's time, whose zeal against blood caused Murther to be punished with death; but the Danes bringing in a moderation, if it may rightly be so called, are now seconded by their kindred the Normans, who will not admit of punishment by death, partly because being a warlike people, bloodshed might seem to rank itself under the Regiment of valour, and partly because they owed much to that Title for the possession of all that they had gotten in England. And to prevent scandal, entring upon the rear, opinion stept in, that a miserable life was more penal than death; and therefore in crimes of the deepest dye, they came to fine and loss of Member: and which course prevailed most, either to stop or enlarge the course of that sin, was left to the disposition of such as intended to make trial. But in matters of less malignancy, the purse rather smarted than the body, wherein they proceeded so far as to punishment of death by violence; yet was not the fine to be measured by the judgment of the mercy or rigour of any person, but only of the Law itself, which set down in certainty both the nature and quantity of the fine; and lest that memorial upon record of a good mind at least to an equitable and just Government. In all these cases of breach of peace, the King's Court becomes possessed of the right of cognizance, and the peace

Ll. Gulielm. cap. 67.

Ibid.

Miror. 254. Ll. Gulielm. c. 8, 10, 12, 13, &c.

Ll. Gulielm. cap. 3. peace is now called the *King's peace*; not so much because that it is left only to his providential care to maintain, as because the fines for most of those crimes pertaineth to the King: for otherwise there is a sort of crimes that are *contra pacem vicecomitis*, as will be more cleared hereafter.

I shall conclude this Subject with these three Observations: First, that the Laws in those ancient times of the *Normans* were so general, as they then made no difference between places or persons; but whether the peace was broken upon holy or common ground, or upon a Lay-man, or one in orders, the Lay-power seized upon all. The second is the care they had for apprehending of the offenders in this kind. If the party slain were a *Norman* or *Frenchman*, the Lord of the Manslayer was charged to have him forthcoming within a certain time, or pay the King's Fine of 46 Marks, so long as he had wherewith to satisfy, and for what remained the whole Hundred was charged. But if the party slain were of any other people, the Hundred was immediately charged with the Manslayer, and must bring him to answer within a certain time, or pay the King's fine. The third and last is, the care they had to prevent breach of peace for the future; first in settling of night-watches by all Cities, Boroughs, Castles, and Hundreds, in such manner as the Sheriff or other chief Officers by Common-council shall advise for the best safety of the Kingdom. Secondly, in forbidding entertainment of unknown persons above three days, without surety for their good abearance, or becoming their pledge for the publick safety, nor to let any persons pass away without testimony under the Ministers and Neighbours hand of their good carriage.

Ll. Gulielm. cap. 53. Ll. Hen. 1. cap. 10. Ll. Gulielm. cap. 26. Ll. Gulielm. cap. 56. Ll. Gulielm. cap. 46. Ll. Hen. 1. cap. 8. 7. Commandment. *A Man committing Adultery with a Married Woman, shall forfeit to his Lord the price of his life.*

1. Ll. Gulielm. cap. 14. Ll. Hen. 1. cap. 10. This made the crime enquirable at the common Law, as an offence *contra pacem Domini*; but afterwards it was finable to the King, and enquirable amongst the pleas of the Crown by the Law of Henry the first.

2. Ll. Gulielm. cap. 19. *Force upon a Woman, to the intent to Ravish her, is finable; but if a Rape be committed, it shall be punishable with loss of Member.*

The crime and offences against this Commandment were always punished in the Temporal Courts, by Fine at the least; and are still in the *Normans* time prosecuted in the same way, notwithstanding the growing authority of the Canon.

8. Commandment. *Robbery is finable.*

Ll. Gulielm. cap. 4. Glanv. 1. 6. cap. 6. Hoveden. The different Law between the *Saxons*, *Angles* and *Danes*, now by the *Normans* is settled in the more merciful way; and in case the delinquent made flight, the pledge satisfied the Law for him. But in the latter times of Henry the first the Law was again reduced to the punishment of this crime by death, and so hath continued.

9. Commandment. Ll. Gulielm. cap. 57. Ll. Hen. 1. cap. 10. *There shall be true weights and measures throughout the Kingdom, and those shall be sealed.*

And this was the constant *Saxon* Law.

Perjury to be punished by fine, and as formerly still inquirable among the Crown-pleas.

CHAP.

C H A P. LI.

The like of Laws that concern common interest of Goods.

IF Cattle be taken by Distress, the party that will replevy them shall pay for the return of the Cattle, and give security to bring the Distress into the Court, if ^{1.} Ll. Gulielm. cap. 6. within a year and a day it be demanded.

This Law I take to be intended where the Cattle are taken damage feasant; because nothing shall release the Distress in other cases, but obedience to the Summons.

No Distress ad comparendum shall be taken but after three several Summons, and so many defaults made; and in such case Distress shall issue by especial order from the ^{2.} Ll. Gulielm. c. 42. County-court.

I noted this partly to shew the difference of the Normans from the Saxons in the delay of execution of Justice by so much mean process, and partly to shew the difference between the Norman times, and these days wherein mens Cattle lie open to the distress of every oppressing or extorting Bayliff or unknown person, and no Summons made at all, whereby many poor mens Estates are either undone, or they must submit to the unjust demands of their adversary.

No manner of Goods of above four pence in value shall be bought, unless in the presence of four Witnesses of the Town. And the vendor shall satisfy out of his own Estate, if ^{3.} Ll. Gulielm. c. 43. the sale be not effectual, and in case the vendor have no warrant for such Goods by him sold.

No living Cattle shall be sold, but only in Cities, and before three Witnesses; nor shall any thing forbidden be sold without Warranty. ^{4.} Ll. Gulielm. c. 60.

No Fairs or Markets shall be holden, but only in Cities, Boroughs, Wall'd-Towns, and Castles. ^{5.} Ibid. c. 61.

These Laws concerning Sales and Markets were ancient Saxon Laws, and tend all to the avoiding of cheating men of their Cattle by surreptitious sale of them made by such as had no right.

Goods found shall be published by the Finder to the Neighbourhood; and if any makes ^{6.} Ll. Gulielm. c. 7. claim and proof of them to be his, he shall have them, giving security to bring them into the Court, in case any other shall within a year and a day make his claim thereto.

The Children of persons intestate shall equally divide the Heritage. Ll. Gulielm. c. 36.

This is in terminis the Saxon Law; and therefore concerning it I shall refer to the same formerly recited; only I shall add hereto the Law of Henry the first, which may serve as an explanation of the former. Any Freeman may devise his Chattels by will; and if he die intestate, his Wife, Children, Parents, or next kin shall divide the same for his Soul's good. The first branch whereof was ancient, and doubtless in continual use; but the iniquity of the Norman rude times was such, that the Lords under surmise of arrears or relief, would seize all the personal estate after the

Tenant's death, and so the right of last Wills was swallowed up; but this restoreth the power of last Wills into its place, and in case the party died intestate, preserveth a kind of nature of descent, although they be more personal. Nor doth that last clause of the *Soul's good*, disannul the same, although the words may seem to carry away the benefit to some other hand. For the whole matter is left to the discretion of such as are next to the Intestate.

C H A P. LI.

Of the Laws that concern common interest of Lands.

THE Laws that concern Lands, and peculiarly belonging to the *Normans*, are such as concern principally the tenure of Lands; which if duly considered, although it favoured somewhat of the King, yet little of the Conqueror. For generally it must be granted, that Tenures long before and after this time, were, as the services, ordered according to the Will of the giver, in which as the King had the greatest share, and he the most publick person of all: so were his Donations ordered chiefly to advance the publick service; and in this regard the Tenure by Knight service might more principally challenge the King's regard, than the regard of all the great men besides. But this was not the sore, yea, rather it was the beauty and strength of the Kingdom; and for which the King deserved an honourable name above most of his progenitors, who had not so much Land to dispose of as he had, and therefore could not advance that service in a proportion equal unto him. The sore that caused so many sighs, was the incumbrances raised upon this most noble and free service, which through the evil of times by this means became the most burdensome, and the only loathed and abhorred service of all the rest. I say through the evil of times; for it cannot lodge in my thoughts but that in the *Norman* times the incumbrances were nothing so great as of latter Ages, and that much hath been imputed to the Laws of the Conqueror, which they never deserved, as may appear in these particulars, which the Laws of *Henry the First* have preserved in memory.

Reliefs.

Vide post 125.

193. 2 Inst. 8.

1 Relief.

M. Paris.

An. 1100.

& 1213.

Tenant of the King, or other Lord, dying, his Heir shall pay no other relief than what by Law is due.

That which by Law is due, is set down in the Laws of *William the Conqueror*,

11. Gulielm.

c. 12.

The Relief of an Earl,

8 Horses saddled and bridled.

4 Helmets.

4 Coats of Mail.

4 Shields.

4 Spears.

4 Swords.

4 Chafers

1 Palfrey } bridled and saddled.

The Relief of a Baron. { 4 Horses with Saddles and Bridles. Ll. Guliel. c. 23.
2 Helmets.
2 Coats of Mail.
2 Shields.
2 Spears.
2 Swords.
2 Chasers } bridled and saddled.
1 Palfrey }

The Relief a Vivasor to his Lord. { His best Horse. Ibid. c. 24.
His Helmet.
His Coat of Mail.
His Shield. s.
His Spear. 100
His Sword.
Or if he had no Arms, then he was to pay }

The Relief of the Countryman is the best Beast that is in his possession; and of him that farmeth his Lands, a year's rent. Ll. Gulielm. c. 29.

These are the *Reliefs* due by Law, and now settled in Goods or Arms, but afterwards turned into Money *; and it is likely that the ill customs in the former times did extort both Money and Arms, or such sums of Money as they pleased: and by the very words of the Law, it seems they had brought it to an arbitrary power, to take what they could get, and yet all against Law. * See Hales and Gilbert's History of the Exchequer.

The King's Tenant shall advise with the King in marriage of his Daughter, Sister, Niece, or Kinswoman; and his Widow in like manner. 2. Marriage.

The sense hereof in short is, that these might marry at their own will, without paying Fine or Composition to the Lord; and yet must have the liking of the Lord so far as to declare whether the man intended were his Enemy or not, and fit to perform Knight-service. This Law was therefore grounded upon the present distress of affairs, wherein the Nation was unsettled, and common right having established a mutual trust between Lord and Tenant, found out this means to preserve the same: for if the marriages of those that are related to the Tenant in such manner as may inherit part of all his Lands, or have jointure therein, should be left altogether at the liberty of the Tenant or his Widow; it must needs follow, that the mutual trust between Lord and Tenant must fail, and the publick receive damage. And therefore if this custom were of Norman birth, it was begotten upon a Saxon Law, and might the rather be owned by the English.

The Widow of the King's Tenant, having Children, shall have her Dower and Portion so long as she keeps unmarried. 3. Dower.

The portion here is in the Latin word *maritagium*, which I take to be the Marriage-portion given by the Husband according to the Saxon custom, whenas the Dower in Land was not in use; whereof is spoken formerly in that Chapter of Dower. And the Normans were necessitated to introduce this custom of theirs with them.

Lindenburg.
Concil. An-
ham. c. 19.
ll. Edm.

Mirror. fol. 20.

themselves; partly because it was a privilege which was their own by birth, and it could not be waved without an evident wrong done to the Wives of these men who had ventured their lives in that service; but principally because it would not consist with the work in hand to disclaim that custom which must needs be of infinite consequence in the effecting of what was principally sought after, viz. the union of the two peoples, *Normans* and *Saxons*, into one: I say, it was principally sought after by the *Norman* Conqueror, if not led thereto by his own genius, yet necessitated thereto by force of reason of State, as shall appear hereafter. And what could be imagined a more ready way to stay the effusion of blood, and all other unhappy events of enmity, than by taking away enmity itself? or a more speedy and certain course for union, than to reduce the Men and Women of each people to mutual society, and to seal up all by a lasting bond of Marriage? or greater encouragement for the comfortable proceedings therein, than the settling of the constant maintenance of the Wife, in case of survivorship, by the Law of Dower of the Lands and Tenements of the Husband? which was so full of contingencies and uncertainties in the portion of Goods that was by the *Saxon* Law appointed to the Wife in such case. Nor was this all; for by Marriage thus made to the *Normans*, they had a great hold, not so much over the *English*, as in the *English*; and that not only during coverture, but by reason of this title of Dower, the Women became Tenants, and under the Lord's wing, so as they durst not willingly and illegally offend their Lord in their Widowhood, nor by Law nor reason match themselves and their Dowry to any other that was not first allowed by the Lord to be in friendship with him: and thus became the Tenants Widows to be at the liking of the Lord for their marriage. And the like hereto may be said concerning the Husband in case of Tenant by the courtesy; and however by the *Norman* former practice it was much disturbed, yet by *Henry* the first it was again reduced to its former right, rather than originally arising from his grant, as some hold, and proved advantageous for the ends aforesaid. Now as touching their marriage-portion of Goods, because the *Saxon* Law had already endowed them thereof, they could not be induced to lay down their known ancient right, till they found the new Law of Dower to settle; and so for some time both Laws were in force, until the more ancient *Saxon* law had an honourable burial. Nevertheless for the present, the Law abridged that right so far as to limit it to the Widow during Widowhood, according to the former *Saxon* law. Upon consideration of all which, it may well be conceived that the power of the Lords in consenting or dissenting to the marriages of their Tenants, Widows, and Wards, was not so much an usurpation upon the common right of the *English* Subjects, as a custom rationally, and with great wisdom, as the course of affairs then stood, upholden and allowed amongst them, principally for the speedy settling of a peaceable Government, and consolidating of two Nations into one, and wherein *England* was then so happy as to come to a conclusion in seven years, which cost their Ancestors nigh two hundred years experience with the *Britains*, besides a world of blood-shed that might have been spared, ere they could find out the right way to a desired peace by mutual marriages had between them.

cap. 4.

Such Widow shall have the custody of the Lands of such Children, or otherwise such other person as by right ought to have the same.

Wardship.

This is the first news of Wardships that passed abroad *cum privilegio* of a received Law, which, together with the former, declare the right custom of the *Normans*,
and

and thereby the *injustas consuetudines quibus Angliæ regnum opprimebatur*, viz. *Ar-M. Paris.* arbitrary Relief taken of the Tenant's Estate, arbitrary Marriages made of their Persons, and arbitrary Grants of Guardianship of their Lands: For as yet oppression was not so high-flown as to cast the government of the persons of their *Wards* out of the view of the Lords provisionary care, upon adventure of the next in Law, whether man or woman, wise or unwise, under pretence to train him up in military service fit for the Lord's own safety, and the kingdom's lifeguard: But it was the proper ground of the Lord's own seizure and right of *Wardship*, he being looked upon by the eye of common reason as the only meet man that both could and would effect that work, so as might be most advantageous to the publick; which seemed to be chiefly concerned herein. And upon the same general ground the survey of fools accompanied the former, albeit it was not in practice till *Henry the First* brought it in, as the *Mirror of Justice* saith (fol. 258.) yet it came upon an ancient foundation laid in the time of the *Danes*. For my own part, I will not dispute the point whether this *LI. Canut. 37.* custom of *Wardship* was purely *Norman*, or whether it was derived from the *Saxons* anciently, who possibly might have some respect to Orphans, in such cases to train them up for the publick service in point of War; especially being possessors of a known right of *Relief*, as well as *Alfred the Saxon King* did undertake the work for the *Affer. Menev.* training of some such particular persons in Learning for the service of the Publick, in time of peace and civil Government. Yet thus much appeareth, that *Guardianship* of Lands was a known Custom, enough to make and maintain a right; and that it by Law was a right belonging to some persons before others; and that this had been a custom before the former unjust customs crept into the Government of the Conqueror, and principally of his Son *Rufus*. And though it be questionable whether it settled first upon the *Normans* or the *English*, yet it is manifest that if one people had it, the other people now coming into union with that people, could not in reason except against that custom which the other people had taken up upon so honourable grounds as reason of State, which as the times then were, was evident and superlative; especially the customs being under the regulating of Law, and not of any Arbitrary power; and can be no Precedents of *Relief*, *Marriage*, and *Wardship* that after-ages usurped.

Tenants in Knight-service shall hold their Lands, &c. acquitted of all Taxes, that they cap. 5.
may be more able to provide Arms, and be more ready and fit for the King's service, and 5.
of the Kingdom. *Acquittal.*

This Law, whether it be a renewing of a former custom, or an introduction of a new Law, it is clear it was upon an old ground: That Tenants by Knight-service must be ready for the service of their Lord, and defence of the Kingdom; whereof afterwards. But the Law is, that these men shall hold their Lands of that Tenure acquitted of all Taxes, though legally imposed upon the body of the Kingdom, which must be conceived to be for the publick benefit, viz. either for the preparation or maintenance of publick War; for in such cases it hath been in all times held unreasonable, that those whose persons are employed to serve in the Wars, should hold Lands doubly charged to the same service, viz. to the defraying of their own private expences in the War, and maintenance of the publick charge of the same War besides.

Of divers Laws made concerning the execution of Justice.

Although in proceedings in Cases of vindictive Justice Delinquents might seem to be left rather to the fury than mercy of the Law; yet so long as men are under the Law, and not without the Law, it hath been always held a part of Justice to extend what moderation might possibly stand with the honour of the Law; and that otherwise an over-rigid and fierce prosecution of the guilty, is no less tyranny than the prosecution of the not-guilty: and although violence was the proper vice of these times, yet this point of honour must be given to the Normans, That their Sword had Eyes, and moved not altogether by Rage, but by Reason.

1. *No Sentence shall pass but upon averment of the complaint by Accuser or Witnesses produced.*
 Ll. Hen. 1. c. 5.

2. *Fine and Pledges shall be according to the quantity of the offence.*
 Ll. Hen. 1. c. 5.
 M. Paris. By these two Laws of Henry the first, the Subjects were delivered from three great oppressions. First, in making them offenders without Complaint or Witness. Secondly, in imposing immoderate Fines. Lastly, in urging extraordinary Bail.

3. *Forfeiture of Felons Lands is reduced to a year and a day.*
 Miror. fo. 261. The Normans had reduced the Saxon law in this case unto their own Last, which stretched their desire, as far as the estate would bear; but this being so prejudicial to the immediate Lords, who were no offenders in this case, and so contrary to the Saxon law, it was both done and undone in a short space by the allowance of Henry the first.

4. *Intent of Criminal offences manifested by Act, punished by Fine or Mulct.*
 Miror. fo. 254. This by Alfred's Law was punished by Talioes Law, but now by a Law of Henry the first reduced to Mulcts.

5. *Mainperners are not to be punished as Principals, unless they be parties or privies to the failing of the Principal.*
 Miror. fo. 141. This Law of Henry the first repealed the former Law of Canutus, which must be acknowledged to be rigorous, although not altogether without reason.

6. *No person shall be imprisoned for committing of a mortal Crime, unless first he be attainted by Verdict of Twelve men.*
 Ll. Hen. 1. c. 5. By Imprisonment, is intended close imprisonment, or imprisonment without Bail or Mainprize; for otherwise it is apparent, that as well by the Saxon as Norman Laws, men were brought to Trial by restraint. The Verdict here intended is that of the Grand Jury.

7. *Appeals of Murder restrained within the fourth degree.*
 Miror. c. 2. sec. 7. Before this Law, Appeals were brought by any of the blood or kin of the party slain; but now by Henry the first restrained. The ground seems to be, for that affection

affection that runs with the blood, grows so cold beyond the fourth degree, that the death of the party is of so small account, as it can scarcely be reputed a loss of such consequence to the party, as to expose the life or price of the life of the Manslayer unto the claim of such an one. And thus the *Saxon* law that gave the satisfaction in such case to the whole kindred, became limited to the fourth degree, as I conceive, from the Ecclesiastical constitution concerning marriage.

Two things more concerning juridical proceedings may be noted; the one concerning speedy course of Justice, wherein they may seem to justify the *Saxon* way; but could never attain to their pace, in regard they yielded so much time to *Summons*, *Essoyns*, &c. The other concerns election of Judges by the parties; for this we find in the Laws of *Henry* the first.

C H A P. LIV.

Of the Militia during the Normans time.

THE power of *Militia* is either the Legislative or Executory power: the Legislative power without contradiction rested in the grand Council of the Kingdom, to whom it belonged to establish Laws for the government of the Kingdom in time of peace. And this will appear in the preparation for War, the levying of War, and managing thereof after it is levied. For the preparation, it consisteth in levying men and munition, or of money. In all which questionless will be a difference between raising of War by a King to revenge a personal injury done to the King's own person, and a War raised by the whole Kingdom, or representative body thereof, which is commonly done in defence of publick interest, and seldom in any offensive way, unless in recovery of a right of possession, either formerly lost, or as yet not fully settled. Now although it be true, that seldom do injuries reflect upon the King's person alone, but that the Kingdom will be concerned therein to endeavour a remedy; yet because it may fall out otherwise, and Kings have taken occasion to levy War of their own accord, in such case they could neither compel the persons of their Subjects or their Estates to be contributory. And of this nature I take the War levied by *Harold* against the Conqueror to be, wherein the greatest part of the Kingdom was never engaged, nor therefore did it feel the dint of the Conqueror's Sword at all; and in this case the *Militia* must be allowed to such as bear the purse: nor can it be concluded to be the *Militia* of the Kingdom, nor any part thereof, although the Kingdom may connive thereat. But to set this consideration aside, as not co-incident at all with the *Norman* engagements after they were crowned, and to take all the subsequent Wars to be meerly defensive of the right of the Crown, as in sober construction they will appear to be: as touching the levying of money, 'tis evident that it lay only in the power of the grand Council of the Kingdom; for otherwise the Laws were settled that *no Tax should be made or taken but such as were due in the Confessor's time*, as formerly hath been shewed. Secondly, for the preparing of men and munition, it was done either by Tenure, or by special Law. As touching Tenure, it was provided by way of contract, that those that held by Knight-service should be ready with their Arms to assist the King for the defence of the Realm: So as they were not bound by their Tenure to aid him in any other

- Li. Gulielm. other cases. Others were also by special Law of the Land bound to be ready for
c. 57. their service in that kind: For all the Inhabitants of this Kingdom held their Estates under a general service, which by common right they are bound to perform, viz. in time of danger to join in defence of their Country: This is the common Fealty or Allegiance which all men owe; and which if neglected or refused, renders the party guilty of Treason against his Country, and his Estate under the penalty of forfeiture, according to the old *Saxon* Law revived and declared by *Henry* the first. Thus the Law made preparation for the War, both of Men and Arms. Castles and Forts were likewise either first made by the order of the grand Council, or otherwise allowed by them, for the defence of the Commons and the Kingdom; so was the Law of *William* the first. The levying and managing of the War must not be denied *de jure* to belong to the representative body, so far as may consist with the directory part, for that it is a main part of the Government of the Kingdom in times of War: And therefore *Henry* the first, amongst his Laws made in the ordinary course of Law-making, provideth for the ordering of men in the Army in the field; and established a Law, that such as forsook their Colours or Associates in the field, during the Battle, should be punished with death, and forfeiture of his whole Estate. Nor yet can it be denied but that *de facto* Kings of their own accord, and by secret Council, did direct therein: either in the vacancy of Parliament, which was the general case of the first times of the *Norman* Conqueror, and the whole Reign of *William Rufus*; or by connivance of the grand Council, while they saw nothing done but what was well done. Nor can it be rationally said that Kings by such advice as they have (in the recess of the grand Council) levying War in defence of the publick according to rules, do otherwise than their duty; or if the grand Council look on, see nothing misgoverned, and say nothing, that they do other than is meet: For it must be remembred, that Kings in their first original were rather Officers for War than Peace; and so are holden by all Antiquity, and as Generals in War were called *Reges* or *Imperatores*, by the *Grecians*, *Romans*, and *Germans*. And at such times as War was concluded, at the general meeting of the people they chose their *Dux* or *Rex*, call him which you please; and he being chosen, all bound themselves to be at his command, and to defend his person. So as while a King keepeth within his place, in time of danger it is duty first to stir himself, and stir up the rest; to lead them and order them, as may be most for the publick defence, and to govern the Army by such Laws as are or shall be established by order of the publick Meeting, and in case of sudden exigencies to use his own wits; and in all this is the common liberty no whit infringed, in regard that all is for the publick defence, to which the Knights are bound by their Tenures, and all others by the Law. And this was this Kingdom's case in the *Normans* time, that both Leaders and Soldiers, whether by election of the people, or prescription, yet all served for the defence of the Kingdom. Nor were they comparable to any other service inconsistent therewith, nor to stand to any judgement in such cases differing from, or contrary to that of the Parliament itself.

C H A P. LV.

*That the entry of the Normans into this Island, could not be by Conquest.**

THAT in point of fact, the entry of the *Normans* into *England* was not by Conquest, will sufficiently appear from what hath been already noted. I shall make one step further, and shew, that as affairs then stood with the Conqueror, it was impossible for him to merit that name against the stream of Providence, that had pre-engaged him to three sorts of men, viz the *Normans*, the *Clergy*, and the *Commons* of *England*.

It must be taken for a ground, that Duke *William* must give all fair correspondency to the *Normans*, considering they are Members of his own Body, and the Arm of his Strength, without which he could do nothing. And it is not less certain, that however the Sea divided the two Countries, yet long before the arrival of the Army the *Normans* and *Saxons* were so well acquainted by the latter access of the *Danes*, that partly by marriage and other interests, the *Normans* made so great a party in *England*, as that party merited no less from the Duke in his entrance, than those he brought with him: And therefore both they and their Allies in all reason must expect such reward of their faithfulness to him, as the other had; nor could the Duke deny the same, unless he had disclaimed his own interests, whereof he had none to spare. Secondly, their merit from the Duke was accompanied with no less mutual relation to his Army, being of the same blood with themselves, and of ancient acquaintance; and as impossible it was for the Duke to keep them from consociation with the mixed people, as to abstract the mixed people each from other; one or both of which must be done, and the Conquerors must be kept from incorporating with the conquered, or else the law of Conquest cannot hold. Thirdly, if these two had failed, yet had the Duke by his manner of rewarding his Army, disabled himself from *bolding*, however he might seem to *have* by conquest. Thus was his gift of Manors, Lands, and Franchises unto his Soldiers, compleated with their ancient Rights and Privileges in free service; otherwise it had been little better than a Trap to bring his own men into bondage, who lately were free Soldiers under no better than a Duke of their own election. And their Government in their own Country, however big, yet had not brought forth a Sovereignty into the World; their Duke no compleat King, nor themselves so mean as Vassals; and it was equally difficult for him to get up higher, as for them to stoop lower. And however, it was dangerous now for the Duke to try masteries, unless he meant to hazard all, and to change the substance for the shadow. Lastly, to lay them all aside, and to take the *Normans* as in themselves considered, a People under such Laws and Customs as were the same with the *Saxons*, and originally in them, and from them derived into *Normandy* by *Rollo*, or some other; or take them as a People willing to lay aside their own Law, as some Writers affirm, and more willing to take up the *Danish* customs, which were also very nigh akin to theirs, and in part settled by the *Danes* in that part of the Kingdom where themselves most resided: It must be concluded, that a Government by

* See Sir Matt.
Hale's Hist. of
the Law, c. 5.
p. 74, &c.

M. West.
An. 1072.
Li. Gulielm.
cap. 55.

Law was intended, and such a Law that was no way cross to the Fundamental Laws of this Kingdom, but concurring therewith, in every of which regards, the future Generations may justly claim their Immunities as Successors and Heirs unto the *Normans*, albeit no *Saxon* could have enjoyed or derived the same to Posterity.

A second sort of men that made the King incapable to hold by Conquest, was the *Clergy*, a considerable part of the Kingdom in those days, whereas in every Nation they grew checkmate; and in this * Kingdom had well-nigh the one half of the Knights fees and thereby a principal part of the strength of the Kingdom, besides the Consciences of them all: and for a Reserve, they had the Pope in the rear, whose power in every Kingdom was little inferior to that of the King's own, and therefore sufficient to stop an absolute Conquest, unless the *Clergy* were first conquered. But the King came in upon great disadvantages in both these regards: for whereas his pretence upon his entry was to advance Justice principally toward the *Clergy*, who formerly were wronged by *Harold*, or voiced so to be; this bound him from Injustice and Oppression. And furthermore, the Pope had him in a double bond; one as Prince of the *English Clergy*, the other as Judge of the Title of the Crown by the King's own Election; and that by Sentence: for the King had merited of him, if not to hold the Crown it self by Fealty to the *Roman* See, yet by such services, as that the Tripple-Crown should be no loser. The King therefore must resolve to have no more to do with the Church than will stand with the Pope's liking, unless he meant to adventure himself and all he had into the danger of the great Curse, of which the King would seem more sensible than perhaps he was. Nor were those times of the Church so moderate, as to bring forth Churchmen that would catch the good will of the Laity by condescension; or Popes of that height of perfection, as to part with one tittle of their great Titles, much less aught of that pitch of power which they had griped, though it would save the World from Ruine. In all which regards the *Norman* Duke was too far inferiour to attain by Conquest any thing in this Kingdom, wherein the Pope or *Clergy* claimed aught to have or do.

A third sort of People avoided the dint of Conquest, either by timely siding with the *Norman*, or by constant resisting of him, or by neutrality. Of the first sort were many, both Lords and others, that by affinity and consanguinity were become *English*-men to the *Norman* use; others were purchased thereunto by the *Clergy*, that were zealous for the Pope's honour, that was engaged in the Work. Of those likewise that were resolute in the defence of the Liberty of their Country, there were not a few that purchased their Liberty, who otherwise might under pretence of Treachery have forfeited the same to the rapacious humour of the Conqueror. And this was not done only by Valour; for *Normandy* stood in a tottering condition with their Duke, partly drawn away by the *French*, that feared the Duke would be too strong for them; and partly declining their own further aid, lest their Duke should be too great for the Dutchy. It was therefore wisdom in the Conqueror to settle the *English* affairs in the fairest way, to gain them for himself, who had been so brave against him. But the greatest number, especially of the Commons, looked on while the game was a playing, as contented with the cast of the Dice, whatever it should be. These were afterwards by the King looked upon, not as Enemies (as the precedent of *Edwin* of *Sbarneburn*, witnesseth sufficiently) but such as either were, or by fair carriage would be made his

*Note, Edward the Confessor had advanced many Normans to Bishops, Abbots, &c. who paved the way to W. I. vide ante. and Sax. Chron. 167, 168, &c. c. 72.

Hoveden, 16.

Ingulfus, 512.

Gloss. 217.

his friends; and therefore he concluded them under a Law of assurance, that they that had been so peaceable, should have and enjoy their Lands as entirely and peaceably as they had formerly done before his entry. To conclude therefore this point; if these three parties of the *English Normans*, the *English Clergy*, the *stout English*, and the *peaceable English*, be set aside from the Title of Conquest, it will be probable that not one tenth part of the Kingdom were ever under other change than of the Governour's own person.

CHAP. LVI.

A brief Survey of the Sense of Writers concerning the point of Conquest.

THE clamours in story that the *Conqueror altered and made Laws at pleasure*, ^{*See Sir Mat. Hale's H. of the Law, cap. 5.} brought in new Customs, molested the persons and Estates of the People with Depopulations, Extortions, and Oppressions, and others of that nature, have made latter times to conclude his Government to be (as of a *Conqueror*) meerly arbitrary, and that he did what he list. How different this conclusion is from the intent of those Writers, I know not; but if the King's Title and Government was a *Conqueror*, then was his Will the only Law, and can administer no cause of complaint of wrong and oppression: and therefore if these be taken in nature of complaints, they declare plainly that there was a Law in Title, or else there could have been no transgression or cause to complain. But if the Reader should apprehend these passages in Writers to be no other than sober Relations, then were it not amiss to consider from what sort of men these Complaints or Relations do proceed, viz. from Writers that have been cloystered men, little seen in affairs of State more than by common report and rumour; prejudiced by the King's displeasure against their Cloysters, and therefore apprehensive of matters in the saddest sense, and many times far beyond the truth, and might as well be supposed to mis-relate, as to mistake. For if we shall touch upon particulars, I think no man will deny but the King allowed property indifferently, as well to *Normans* as *English*, if the premises be rightly considered: and therefore though somewhat be true of the plundering of houses of Religion, persecuting of the *English* Nobility, deposing of Bishops and Abbots, whereof they speak; yet all might be deservedly done in a legal way, and in execution of Justice, whereof Historians are not altogether silent. Nevertheless, if in the prosecution the King did shew a kind of rage, and some rashness, it might be imputed to the common infirmity of great men: for as Oppression upon those that are inferiour, make them mad, so doth Treachery against them that are superiour make them little other; especially if they be overtaken with a fit of passion in the instant, or their minds wrapped into a whirlpool of affairs.

But the *change of Laws* makes the greater noise; wherein what change they suffered, may appear from the premises, if Writers have dealt uprightly; otherwise general imputations without particular instances, will never sway Opinion contrary to the current of the Laws that are published; especially seeing we have observed the error of the best Historian of those times, in calling those things new,

were anciently used in *England*, before *Normandy* was in a condition of a State. Yet if this should be granted, and that there were such change of Laws as is pretended, it makes nothing to the point of Conquest, so long as the new Laws are made by advice of Common-council, and for the common good; and so long as they are established to be Rules for Government. I remember it is affirmed by some of those ancient Writers, That the Duke or King, would have brought in the Customs of *Norway*, but the earnest Mediation of the *English* prevailed against it: and this evinceth two things to my opinion; First, that there was question made what Law should be established. Secondly, that notwithstanding the Interest that the *Normans* had in the Kingdom, they could not prevail to bring in the whole body of their Law, or of the Customs of *Norway*; which were not only the *prima materia* of their Law, but also in kind had a settling at that very time in those places of this Kingdom where the *Danes* had their principal seat: and therefore not altogether strange to the *Saxons* themselves. The sum of which will be this, That upon debate a Law must be settled, and that not the Law of the Conqueror's own Will, nor the Law that suits with his Desire; but the ancient Law of the Kingdom: And therefore if at any time the unquietness of some of the *English* brought the King to some thoughts of Arbitrary Rule, and to shake off the clog of the *Saxon* Law, it was long e'er it stirred, and sprang up too late to raise the Title of Conquest, and withered too soon to settle it.

As touching the *change of Customs* (for that also is imputed to the Conqueror) it cannot be denied but some alteration might be in matters of smaller consideration; yet are the Writers not without mistake in the particular instances: For whereas they tell us that the Conqueror took away the custom of *Gavel-kind*, and brought the custom of descent to the eldest Son; and that *Kent* saved their Liberties, and continued this custom of *Gavel-kind*: I shall not contend about the Liberties of *Kent*, but must, till I see better reason, hold the opinion of the change of Inheritance to be a meer conceit. For (besides what hath been already said concerning that custom of *Gavel-kind*) if we believe *Glanvil*, the difference was between Lands holden by Knight's-service, and in Socage; the first of which in his time, by ancient custom, always descended to the eldest: and those Lands that were holden in Socage (if not partible by custom, in which case they went equally to all the Sons) went by custom in some places to the eldest, in other places to the youngest; so as the Rule of Inheritance in the *Norman* times was custom, as well as in former times. And furthermore, if the custom of *Gavel-kind* had been the general custom of this Nation, the King by his change had contradicted his own Prerogative, and granted as great a Liberty to his Subjects as could have been invented: For had the custom of *Gavel-kind* happened upon the Lands in Knight-service, it had brought all the Sons under the Law of *Wardship*, and had made a ready way to enthral all men of Worth, and undo all Husbandry; the first whereof had been as advantageous to the King's private interest, as both destructive to the publick.

Nor is it clear from any Author of credit, that the *Normans* changed the *Tenures of Lands*; albeit that it cannot be denied but such Lands as he had by forfeiture, or otherwise, were in his own power to dispose upon what Tenure he pleased: for as well before the *Normans* time, as long after, Tenures were like as the Services were, all at the will of the Donor; and were of as many Individuals almost

as the minds of the Owners. Some being of more general regard and public use, are recorded amongst the grounds of *English* Laws; none of which appear to me to be of *Norman* original, although they received their names according to that ^{Little} Dialect.

The next thing objected, is the *change of Language*; which thing, some Writers tell us, the King endeavoured; or which is worse, to be so absolute, as to be absolute Tyrant, and to publish Laws in a foreign Language, that the people through ignorance might the rather transgress, and thereby forfeit their Estates. This (if true) so far differed from the nature of a *Conqueror*, as rather proveth that he was put to his shifts. Nevertheless, the thing tasted so much of Spleen, as it might occasion distrust of other relations concerning this subject. For besides that it is nonsense for a *Conqueror* to entitle himself by a cheat, where he hath an elder Title by *Conquest*; I shall in full answer to that calumny, insert a passage of an Historian that was in the continual view of publick affairs in those times, who speaking of the *Conqueror*, saith, *That he commended the Confessor's Laws to his Justices, in the same* ^{Ingulphus.} *Language wherein they were wont formerly to be written, lest through ignorance the people might rashly offend.* And another Author saith, *That the King had a desire to learn the English Tongue, that he might the better know their Law, and judge according thereto.* It is probable, nevertheless, that the Laws were in the *Norman* ^{M. Paris.} *Tongue*; and it is no less likely that the Pleadings, in *real Actions* especially, were ^{fragm. Gulielm.} also in the same Language; else must the *Normans* be put to School to learn *English*, upon peril of loss of their Estates. But that either the written Laws were wholly concluded in the *Norman* Tongue, or that the publick pleading of Causes by word of mouth in all Actions where the issue was left to the Country, were in any other Language than *English*, no advised Reader will conceive; seeing it had been a madness for an *English* Jury to pass their Verdict in any case wherein it is likely many of them understood scarce a syllable of the *Norman* Language, much less aught of the matter upon which their Verdict should be grounded. Add hereunto, that it is not likely but the Conqueror inhibited the use of the *English* Language in all matters of publick Record, inasmuch as the Charters made by him to corporate Towns and Franchises, were sometimes in the *Saxon*, more generally in the *Latin*, but seldom or never in the *Norman* Dialect; and that Pleadings and Indictments were entered in like manner in the *Latin* Tongue, as formerly by an old custom brought in by the Clergy was used: for the Clergy, who had gotten the Key of Knowledge and Law into their own custody, laid it up in that Language whereof the Commons had little knowledge, that they might thereby be enforced to depend upon these men for Justice, as well as for Piety. The *Normans* therefore either found it too hard to alter the former custom in such cases, or else thought it the wisest way to chuse the *Latin* as a third Language, indifferent as well to the *Normans* as *Saxons*, and best understood of any foreign Tongue besides: and yet endeavoured to bring both Peoples into one Language, as they were intended to be one People; and to press the use of the *Norman* Tongue in publick affairs, so far as might consist with good Government and Justice, leaving time and occasion to work the issue; which doubtless was much, and had been more, had the *Norman* Race continued in the Throne. But it falling out otherwise, the *English* blood prevailed in the head, and their Language continued possession, mixed only with some *Norman* words, as the people also were a mixed people: so as the Language was not changed, though it was altered.

Lastly,

Lastly, it is affirmed that the *Normans* did impose a new custom called *Coverfeu**; and it is thought by some to be a meer Vassalage, that every man at the noise of the Bell every night, must put out both Fire and Candle; and yet it is a matter of so small concernment, that (being in its own nature convenient) *Scotland* received it without such coercion: and it can be reputed for no other than a seasonable advice, which any Corporation in time of danger might order within their own Precinct, without transgressing the Liberty of the Subjects. Of less consequence is that change, which is alledged was brought in by the *Normans* in the *sealing of Deeds* of conveyance, by setting a print upon Wax annexed to the Deed, which formerly was wont to be by setting a print upon the blank at the end of the Deed; and yet it is looked upon by some as a Trophy of *Conquest* or absolute Government. Concerning which, I will not dispute whether the *Normans* first brought in this course, but shall rest in this, That the King being about to compleat the unity of the Laws in the superstructure as well as in the fundamentals, if herein and in some other particulars the *English* submitted to the *Normans*, they likewise stooped to the *English* Law in other things: and therefore such Concurrences ought not to be imputed unto a conquering power, but unto moderation amongst a company of wise men.

Thus having glanced at the changes of Property, Laws, Tenures, Language, and some Customs, we come to that which is the main occasion of all these Complaints; I mean, *unlawful Taxes*, *Afforrestings*, and other such Oppressions upon the Estates of the People: concerning which I purpose not to contend: for much thereof is like to be true. The *Norman* Kings (especially the two *Williams*) were under continual occasion of Expence, many Wars, more Provocations, which kept them ever in Action, and that wrought their spirits into an immoderate heat, little inferiour unto Rage; and so they might soon out-reach their bounds, and sit heavy on the People; and in such occasions no man escaped, *Norman* nor *English*, *Clergy-man* nor *Lay-man*; nor did the Kings themselves come off such gainers, but that they might sometimes put up their gettings into their own eyes, and see never a whit the worse. And yet to do them right, they were not always of such sad influence, but had their *lucida intervalla*; especially he that had the least cause, I mean the *Conqueror*, who certainly was a man of a serious regard; and did not only remit sometimes his Rigour in exacting where he ought not, but also forbear to require that which he had some colour to demand: For whereas the *Dane-gelt* was left unto him in the nature of an Annuity, he was contented to turn it into a sum in gross, and to demand it only *Cum ab exteris gentibus bella vel opinioniones bellorum insurgebant*; and it was then done *consultis magnatibus*. These things thus considered, might have mollified somewhat the Pens of angry Writers; and where they fail, may be caution to readers to consider occasions and dispositions of Princes; and so long as Laws hold in Title, to construe the irregularities of Princes to be but as steps out of the path to avoid a little dirt, that a man may get home the more cleanly; and therefore rightly can derive no other Title of absolute Sovereignty to their Successors, than to hold by infirmity. And thus the Government under the *Normans*, at the worst, was but like that of Childhood, following sudden and present desires, not wise enough to plot for absolute Monarchy, nor to keep off a Polity, which still rooted underneath; though the fruit, while it was now green, was harsh and unpleasant. I shall

Hovden,

* Note, Some hold this to have been an Antient Saxon Custom; but 'tis certain it was abolished by H. I. See his Laws in *Willm.*

I shall conclude this *Norman* Discourse with this Advertisment: That notwithstanding the words *Conqueror* and *Conquest* have often fallen from my Pen, and hereafter may do the like; yet can I see no reason why divers succeeding Kings, coming to the Crown by argument of the Sword, and not by right of Descent, may not deserve the Laurel as well as the first *Norman* King; only because Fame hath fancied him that Title, under a kind of prescription, I do the like, [as to his Denomination.]

C H A P. LVII.

Of the Government during the Reigns of Steven, Henry II. Richard I. and John. And first of their Titles to the Crown, and Dispositions in Government.

I Have cut out this Portion of One hundred twenty and five years (containing the Reigns of these Kings) apart from their Successors, in regard of their Titles; all of them being under one general Climate, and breathing one air of *Election* and *Compact* between them and the People. Now was the Issue male of the Stock of *Normandy* quite wasted: I mean in relation to succession by inheritance: for although it was the lot of Henry the first to have many Children, yet it was not his happiness to have many Lineal, nor to hold what he had; nor of them all was there left above one that might pretend to the Crown, and it a Daughter, who was the great Grandmother to all the succeeding Kings till this day. Only King *Steven*, like an unruly Ghost, coming in upon the Stage, troubled the Play ^{*Steven.*} during his time. This Daughter of *Henry* the first was married to the Emperor *Henry* the fourth; and surviving him, was in her Father's life-time acknowledged to be his Heir, the Sea having formerly swallowed up the remainder of his hope: Unto her the Lords sware *Fealty*, as to the next Successor in the Throne after the decease of her Father; being led thereto by the instigation of her Father, whose Conscience told him, that the title to the Crown by inheritance was weakned by his own precedent, himself coming to the same by *Election* of the People, contrary to the title of his Brother *Robert*. 'Nevertheless, this was not the first time that the *English* Crown refused to be worn by practice; for *Henry* the first being dead, *Steven* the younger Son to a younger Sister of *Henry* the first, put up head; who being of the Royal Stem, a Man, and a brave Soldier, by the ancient course of the *Saxons*, had title enough to be thought upon in a doubtful Succession. Besides, he was a rich man, and had enough to raise up his thoughts to high undertakings; had a Brother a Bishop and Legate to the Pope here in *England*, one who was of a high Spirit, and vast power; advantages enough to have quickned a much duller spirit than his was, who was a Son of a Daughter to *William* the Conqueror. And to make him yet more bold, he had the upper ground of the Heir, who was a woman, disadvantaged by a whispering of wilfulness and customary Government like an *Empress*: which was too high a sail for an *English* bottom, wherein so precious a Treasure as the Subjects Liberties was to be shipped. Thus provided, *Steven* stepped up to the *English* Throne, and with protestations of good Government, entered, and made up the match both for Crown and Scepter, the People waving the

the Title both of *Empress* and *Heir*. The pretensions of the E. of *Blois*, elder Brother to *Steven*, gave way to the common Law and Liberties of the Subject, to fasten, root, and gather strength, after the violence of the *Norman* blasts was out of breath; thus making way over Hedge and Ditch of all Oaths, till the King was quietly settled in the Throne.

Quietly, said I^d that I must retract; for he never had quiet during his life, though generally he was victorious, and did as much as a King could do, that had the passions of a man and Soldier, to give the Subjects content. The true cause whereof, was an error in the tying of the Knot, wherein he neither became theirs, nor they his: for the *Fealty* that was sworn to him, was but conditional, and *cousque*; and yet the King's promises were absolute, and better observed than the People's were, possibly because his Engagements were more. For besides his Protestations, the King pledged his Brother the Legate to the people, and mortgaged himself to his Brother; and to boot, gave both to the *Clergy* and *Barons* liberty to build and hold Castles for their private security: The issue whereof may remind, that too much counter-security from the King to the People, is like so many Covenants in Marriage, that make room for jealousy, and are but seeds of an unquiet life. And thus it befel this King's Reign. His first troubles are brought in by Historians, as if they dropped from Heaven, yet probably came immediately from without, viz. from beyond Sea, where the *Empress* was: for as the King's Engagements were in their first heat on the one side, so was also the *Empress's* Choler on the other side; and therefore might make the first assault. And the King's first success therein falling out prosperously for him, gave him a conceit that he was strong enough to encounter his own Covenant, although in truth he invaded but the skirts thereof; I mean, that collateral security of Castles: for by experience he now feels that they are blocks in his way, he must therefore have them into his own power. But the *Clergy* (loth to forgo their pawn till they had their full Bargain; for now they were working hard for investitures of the Mitred *Clergy* under the patronage of a Legate that had the King in bonds) acted their parts so well, as they engaged the Nobility for their liberty of Castles; in which Atchievement the King was taken prisoner. The *Empress* betakes herself to the *Clergy*, and by the Legate's means, procures a kind of Election to be Queen: But she sick of the Woman's humour, and thinking too much of the *Empress*, and too little of the *Queen*, and forgetting that the *English* Crown would not fit an *Empress*, unless she could fit her head first to it, choaked her own Title by *Prerogative*, and so let the Crown slip through her own hands; which fell upon the head of *Steven* again, who maintained it by his Sword, after by Composition, and then died a King. And thus like a Vapour mounted up by the *Clergy*, tossed by tempests for a time, and at length falling, he gave way to the Crown to have its free course to the *Empress's* Son by *Geoffery Plantagenet*.

Henry the
Second.

This was *Henry* the second, the most accomplished for Wisdom, Courage, and Power of all his Predecessors; and one that wanted nothing but Purpose to have undone what the foreign Princes had done, in the settling of the Liberties of the People: for the Subjects were tired with the unquiet former times, and the *Clergy* in distraction through the Schism in the Popedom between *Victor* the fourth, and *Alexander* the third; and very unfitting all were to dispute the point of *Prerogative* with so mighty a Prince. And it was the Wisdom of God to order his affairs so,

so, as that he was not very fit to dispute with the people in that case: for his Title to the Crown was not very excellent, being neither Heir to the last King that reigned, nor to the last of that Title, I mean to *Henry* the first; but Son only to the *Empress*, who was now alive, and by descent was to be preferred before all other. His Title therefore is clearly by *compact* and agreement made between the Lords, King *Steven*, and himself; all being then ready to try the right by the Sword, to that, to which none of them had any right at all at that time, but by the favour of the people. Nor did the King ever after dispute the strength of his Title, although before he died, his Mother's death conveyed over to him what right of descent soever was consistent with the Law of the Crown; nor did Occasion favour him thereto; for as it is never seen that any man is honoured by God with many advantages, without proportionable employment for the same, so it befell with this King: His great Territories in *France* brought jealousy in the rear; and thence strife and contention with *France*, enough to turn his thoughts from waxing wanton against his own people; and therefore his wisdom taught him to prefer peace at home to the chief of his *Prerogative*; to become somewhat popular, and yet to lose nothing of a King thereby. His way was to keep the Church-men down, that had during his predecessors time grown, whether more obstinate against the King, or insolent over the people, is hard to judge; and in this he had the people to friend, and might have prevailed much more than he did, but that the people feared the threats of *Rome* more than he; and he (if not guilty of *Becket's* death) more the conceit of Fame than there was cause. These concurring with unnatural troubles from most unthankful Sons, made that spirit of his to fail, that formerly knew no peer; as it is often seen that the most generous spirits are sooner quelled with shame and grief, than with fear of any danger whatsoever. Towards his Lay-Subjects he was more regardant for the settling of *Laws*, and executing of *Justice*; so as some have thought him the first source of our *English Laws*; others more truly, the first *Mecænas* since the *Conquest*, that brought on the spring-time of a settled Common-wealth; and therefore left this fair testimony, by his putting forth that Primrose of *English Laws*, under the name of *Glanvil*; letting all men know, that thenceforth *England* would no more veil itself in an unknown *Law*, but explain itself unto the World to be a regular Government. Such was the King's Idea; yet was he touched with so much of the common infirmity of Kings, as shewed him to be a man; especially in his old age, being loaden with Military Affairs, wherein he had been long exercised, he had contracted some shifting courses of a Soldier, in gathering Money and Soldiers somewhat out of the roadway of an *English King*; and led an ill example to future Ages: nor had he other salve for this wound, but that it was for the honour of *Christian Faith*, and for the *Hoveden.* sake of *Jerusalem*. 348.

Next comes in *Richard* the first, *Henry* the second's Son both in birth and courage; yet was his behaviour to his Father such, that his meritorious *Holy War* could never wipe it out of the Calendar of story. His entrance was upon an *Election* made in his Father's life-time, and the same confirmed by receiving of Homage from the Peers. The sad troubles that this *Election* amongst other things occasioned to his Father in his old age, shew plainly that *Richard* trusted not to the Title of Inheritance; nor the *French King* (that took his part) unto the *English* custom; for the possession of the Crown, but all must be done in the Life of the Father;

The Government of John, King of England.

Father; that must secure the Government to the Son when the Father is dead. And thus is he entered upon the Throne, not as Heir, but as Successor to his Father, yea rather as Survivor, taking possession of what was by special compact conveyed to him by the means of his Father in his life-time, though sore against his will, if Writers speak true. As his entrance was, it promised a better Government than followed; for though it was for the most part hidden in the Womb, as himself did subsist in another World; yet by a secret providence he was given over to the election of ill Deputies; and therefore he was not well beloved, however dear he was to this Nation. A third part of his Government was spent in a calm with Pope, Clergy, Commons, and all Nations that were not Infidels, upon conscience it seems that he ought not to be troubled, who adventured his person so bravely in the *Holy War*. But above all, he was the Clergy's darling, not only for his adventure in the *Holy-Land*, but now much more in his return by his imprisonment in *Germany*; and therefore they stuck close to him in his absence, not only in maintenance of his right to the Crown (whereto some made claim, and his own Brother *John* did more) but emptied themselves to the utmost for his delivery, which they effected, to the envy of the *French*, and such as longed for his downfall here in *England*. The King comes like the Sun-rising, scattering his Brother's designs by his very view; then returns his thoughts for *France*, where he spent the rest of a restless life: and as his entry upon the Throne was unnatural (for he made his way upon his Father's Herse) so was his Reign full of troubles, and his end not unlike; for it was violent, and by the hand of his own subject; and so ended his reign, that scarce had any beginning.

John.

Next comes in King *John* to act his part, according to his entry, hand over head; whether called by a people scared with the noise of Succession by inheritance, or such as thought it not convenient nor safe in a stirring time to have a Child to be their King; or lastly, led by an interest that *John* the youngest Son of *Henry* the second had by woful experience obtained amongst the Lords, or some or all concurring; it is clear, they crossed the way of inheritance, waved *Arthur's* Title, who was Heir to *Richard* the first, and by him also appointed to succeed, being then but a Child; and they chose *John*, a man of War, trained up in the Government of *Ireland*, which made way for his active spirit; and well seen in the Government of *England*, which might have made him wise; and under these conceits they were willing to forget his oppression in *Ireland*, his treachery against his Lord and King in *England*, set the Crown upon his head; and in conclusion acted the Tragedy of *Abimelech* in English, wherein the Cedar was rooted up, and the Bramble trodden down.

The general temper of his Government sheweth, that though the King must be thought sober, yet the man was mad, for he hawked at all manner of game, *France*, *Scotland*, *England*, *Laity*, *Clergy*, spared not the Pope himself, scorned to stoop to occasion; all which he did by the strength of the name of a King: till at length, being well cuffed and plumed, he was fain to yoke his lawless will under the *Grand Charter*, depose his Crown to the Pope's foot, and instead of a King, became little better than a chief Lord in *England*. Thus although *Richard* the First forgot this man's disloyalty, yet God remembered it; for the King having gotten the Pope upon the hip, and put him to his last shift to stir up the *French*

French to set his curse on work, was by a hidden providence conquered in the midst of a Royal Army, without view of Enemy, or other weapon than a meer noise; his Nobility (either suspecting all would be gone to *Rome*, or expecting that the King would not deny them their own, seeing he had been so profuse in giving away that which was not his) demand that their Liberties might be confirmed; but he being loth to be mated by his Nobles, though he was overmatched by the Pope, arms himself with the Pope's curse, and the Lords themselves with the *Frenchmens* power: thus the Tables are turned, and the *French* playing an after-game to gain to themselves the Crown of *England*, after they saw the death of a Warlike King, discovered their design before it was ripe; and in the conclusion were beaten out of the Kingdom by a Child.

It is not worth inquiry what the King allowed or disallowed; for it was his course to repent of any thing done contrary to his present sense, and made it his chief principle in policy to have no principle but desire; wherein he triumphed too long, by reason of the contentions between the *Clergy* and the *Laity*; which coming nigh unto the push of pike, and the King ready for the spoil of both; the *Barons* and *Clergy* suddenly close their files, and like a stone-wall stood firm to each other, till the King wearied with successless labour, was glad to give and take breath, confirmed the Liberties of the people by his Charter, which is now called the *Magna Charta*, for substance, and gave such collateral security for performance on his part, as did let the World know the thing was as just, as himself had been unjust. The worst point in the case was, that the people got their own by a kind of *re-disseisin*; a desperate remedy for a desperate condition, wherein the Commonwealth then lay between life and death, upon the rack of the will of a King, that would be controuled by nothing but his own appetite, and was in the end devoured by it.

M. Paris.
An. 1215.

C H A P. LVIII.

Of the State of the Nobility of England from the Conquest, and during the Reign of these several Kings.

U Nder the Title of the *Nobility of England*, I shall comprehend all such as are of the greatest eminency for birth, or wisdom and learning, and advancement into place of Government and Honour. These were in the *Saxons* times the flower of the people, flourishing only from the honour that ascended from beneath; their deportment then was full of cheer and safety to the people: after that *Royalty* sprung up, the influence thereof upon them exhaled such a reciprocal interest back again, as made them less regardful of their own root; whereas we see the more mature flowers are the more propense to turn head and look downward to their own original. This distemper was yet much worse by the coming in of the *Normans*, whose *Nobility*, besides their Titles of honour in their own Country, obtained by custom such command and power amongst the meaner sort, being Soldiers under them in time of the service in the field, that (when the Wars had

breathed

breathed out their last) neither of them could forget, or were very careful to lay aside. This was observed by Kings, an advantage espied to climb to the top of Monarchy by the help of these great men, whom if they could make their own, all would be theirs; and therein they had prevailed much more than they did, if they had been wise enough to have maintained them in unity; but in that failing, the Kings were necessitated to take parties, and serve the Nobility to save the main: and thus continued they a considerable party in the Government of this Kingdom from the *Normans*, for the space of two hundred years well-nigh, to the prejudice both of the growth of the Prerogative of Kings, and Liberties of the Commons; and benefit of none but the Lords, who in those unquiet times were the chief Commanders in the field. This error of the Kings was soon espied, but could not be avoided; it is natural to man to be proud, and to such to fall into contention; another course therefore is taken, *viz.* to raise up some so high as may over-top all, and keep them under: nor is it altogether without reason, for Kings are no ubiquitaries, and some must bear their power where they cannot be personally present; yet it is dangerous to bestow too much upon one man, for there is no man fitting to be a King, but himself that is a King; and where Kings are immoderate in bestowing power, it many times works much woe to the people, and not seldom sorrow to the Kings themselves. The place of the *Chief Justice* was in shew but one Office, yet in these times was in nature of the King's Lieutenant-general throughout the Kingdom. A power and work too great for any one man in the world, that can make no Deputies to manage it; and yet in those times you shall meet with one man made up of an Arch-bishop, a Legat, and Chief Justice of *England*; or a Bishop, a Lord Chancellor, a Legat, and Chief Justice of *England*; and a strange kind of Government must that needs be, wherein the Servant's Throne is above his Master's, and a Subject shall have a plenitudinarian power beyond that which his Lord and King had, or, as the times then were, was capable of. By these and such like pluralities, the great men of *England* kept the Commons below, and themselves above; and probably rendered the temper of the Government of this Kingdom more *Aristocratical* than in after-ages. And if their personal authority was of such value, how much rather in their joint assembly or court of Council! concerning which I must agree, that as in their original in *Germany*, they did consult and determine of the meaner matters, that is to say, of matters concerning Property; and therefore were in their most ordinary work Meetings of Judges, or Courts of Judicature, and also matters of defensive War, because themselves were the Commanders: and lastly, in matters of sudden concernment to the State, not only to serve as eyes to foresee, but to provide also if they can, or otherwise to call in the aid of the people's advice; so also they continued this course, and it may be now and then (as all Councils have done) strained their endeavours beyond their reach, especially since the *Normans* entrance: and therefore I shall not deny but that they alone with the King, and without the Commons, have made many Laws and constitutions, some of which now are called *Statutes*, (although many of them in truth are no other than Rules for Judicature, which ordinary Courts may frame; or Judgments in particular cases, such as are the Constitutions at *Clarendon* in *Henry* the Second's time) and many other Laws which are reported to be made between the King and his Lords. Nor can I look upon such Laws otherwise, than as upon Judgments in Courts of Justice in new points of controversy,

Proveden,

43. 375.

Nebr. lib. 4.

cap. 14.

traverſly, grounded upon ancient grounds, which properly are not new Laws, but the ancient Rule applied to new particulars: and being ſo publiſhed to the World, may bear the name of Laws, Ordinances, Conſtitutions, or Judgments; the word Statute being of latter Times taken up, and uſed in a more reſtrictive ſenſe: of which, more in their due place. Now that this Court was a ſettled Court of Judicature, and ſo uſed, may appear, in that Fines were levied therein, and Writs of Right determined: as in the great Caſe between the two Kings of ^{Hoveden.} *Navar* and *Caſtile*, referred to the Judgment of *Henry* the ſecond, and tried in ^{An. 1175.} *Ibid.* this Court, it is ſaid, that the Tryal was by *Plea*, and if need were, by *Battle*. The Judges in this Court were the Baronage of *England*; for the entry of Judgment in that great Caſe, is thus: *Comites & Barones Regalis Curie Anglie adjudicaverunt, &c.* So as though doubtleſs many were abſent, ſome being enemies, others diſcontented, others upon other occaſions; yet all might claim their Votes as *Barons*. The Preſident over all the reſt was the Chief Juſtice, or if the King were preſent, then himſelf; and by him was the Sentence or Judgment declared, according to the entry in that Caſe aforeſaid, *Habito Concilio cum Episcopis, Comitibus & Baronibus adjudicavimus, &c.* The honour of this Court was great, ſo long as the Lords had liberty or care to attend thereon: but when Kings began to have private intereſts, they would have theſe to be more private Councils; which weakned the eſteem of the Concluſions that there paſſed, and reduced the honour thereof ſcarce to the degree of a Conventicle. And by this means the neceſſity of calling together the whole Body-Representative, was made more frequent, the power of the Nobility of *England* decayed, and this * Court forfeited. ^{See Ch. Bar.} all its Juridical power to the three Courts at *Westminſter*, viz. the *King's Bench*, ^{ron Gilbert's} *Common-Pleas*, and *Exchequer*; ſaving ſtill the ſupreme Judicature unto the grand ^{View of the} *Convention of Eſtates in Parliament*, where all the Lords had liberty of meeting, ^{Exchequer,} and free voting without impeachment, ^{chap. 1.}

C H A P. LIX.

Of the ſtate of the Clergy, and their power in this Kingdom from the Normans time.

IF the *Prerogative* of Kings prevailed not to its utmoſt pitch during the *Normans* time, it did much leſs in theſe times ſucceeding, wherein the Clergy took up the Bucklers, and beat both King and Commons to a Retreat; themſelves in the Interim remaining ſole Triumphers in the Field. In their firſt Adventure they paced the Stage, no man appearing to oppoſe: *Steven* then was King by their leave, and their Bond-ſervant; and they might have any thing, ſobeit they would ſuffer him to enjoy his Crown. His brother the Biſhop was the Pope's ſervant, the Church-men's patron, and the King's ſurety; in whom the Clergy's favour to the King, and his good behaviour toward them and all Men, concentrated. Beſides all this, the King was but ſo upon condition; and there being no better Title than Election, Conſcience in thoſe times was well enough ſatiſfied in the breach of Covenant on their part, when on the King's part it was firſt broken. All this the King ſaw full well; and therefore what can he deny to ſuch Benefactors? Vacancies of Churches he readily parts with; and his right of inveſtiture

of the Mitred Clergy he dispensed: so as he open'd the way to his Successors of an utter dereliction of that Privilege. He sees his Brother the Legate despoil the Crown of *England*, by maintaining the Appeals from the Courts in *England* unto the Court of *Rome*, and he says nothing; he is contented with the stump of the Crown, and (with *Saul*) if he be but honoured above or before all others of the people, it is enough: But the Clergy, like the barren Womb, hath not yet enough. The King hath allowed them Castles; and too late he sees, that instead of being Defences against the Imperial power of the *Empress*, they are now made Bulwarks against the lawful power of a King: he had therefore endeavoured to get them down, and gotten some of them into his power. The King himself is now summoned to answer this before a Legatine Council, wherein his Brother is President: That was a bold adventure in them; but it was extreme rashness in him to appear and plead the Cause of the Crown of *England* before a Conventicle of his own Subjects. And thus to secure *Rome* of Supremacy in Appeals, he suffers a recovery thereof against his own person in a Court of Record; and so loses himself, to save the Crown. Thus are Synods mounted upon Eagles wings; they have the King under them, they will next have the Crown. Within a while *Steven* is taken prisoner: The *Empress* perceiving the power of the Clergy, betakes her case to them now assembled in Synod; they now proud of the occasion (and conceiting that both Law and Gospel were now under their decree) publish, That the Election of the King belongeth unto them; and by them the *Empress* is elected Queen in open Synod, *Steven's* Brother leading the Game: and had she been as willing to have admitted of the Laws as *Steven* was, she had so continued, and had left a strange Precedent in the *English* Government for Posterity. But the Citizens of *London*, who had made the way to the Throne for *Steven*, reduc'd the Synod to sober consideration, and helped the King's return unto his Throne again; wherein he continued a friend to the Clergy during the rest of his time.

Henry the second succeeded him: as brave a man as he, but beyond him in Title and Power; and one that came to the Crown without pre-engagement by Promise or Covenant, saving that which was proper for a King. A man he was that knew full well the Interests in the Government, the growing power of the Clergy, and the advantages lost from the Crown by his Predecessor: And to regain these, he smooths his way towards these braving men, speaks fair, proffers fair; he would act to increase the bounds of the Church: He would have the Pope's leave to do him a kindness; and sobeit he might gain an Interest in *Ireland*, he would take it from the Pope, who pretended, as *Heir of Jesus Christ*, to have the Islands and utmost parts of the Earth for his Possession; and as if he meant to be as good to the Church as *Steven* was, and much better, he desires the Pope's kindness for the confirmation of the Liberties and Customs of his Crown and Kingdom; and no sooner desired than obtained. This was a second Example of a King of *England*, but the first of an *English* King, that sought to *Rome* for Right in the Crown; and thereby taught the Pope to demand it as a privilege belonging to the Triple-Crown. Nor was *Henry* the second less benign to the Church-men, till he found by his dear-bought experience that he had nourished Scorpions; and would have suppressed them, but was rather suppressed himself; as in that shameful success of the death of *Becket* may appear, wherein he yielded the day up to the

M. Paris.
An. 1155.

the Clergy, who formerly scorned to stoop to the greatest Potentate on Earth. The State of Kings is to be pitied, who must maintain a politick affection above, and sometimes against Nature itself, if they will escape the note of Tyranny in their Undertakings, and of a feeble spirit in their Sufferings: For the King having made *Becket* Chancellor of *England*, and then Archbishop of *Canterbury*, he came so great, that his Feathers brushed against the King's Crown; who begins to rouse up himself to maintain his Honour and Prerogative Royal. The Bishops side with *Becket*: the King intending the Person, and not the Calling, singles out the Archbishop, and hunts him to soil at *Rome*; yet before he went, the King puts the points of his Quarrel in Writing, and made both Archbishop and Bishops sign them as the Rights of his Crown, and as the *Consuetudines Avitæ*: But *Becket* repenting, went to *Rome*, and obtained the Pope's pardon and blessing, the rest of the Bishops yielding the Cause.

Constit. at
Clarindon.

The particulars in debate were set down in the nature of Laws or Constitutions, commonly called the Constitutions at *Clarindon*; which shew the prevailing humour that then over-spread the body of the Clergy in those days: and therefore I shall sum them up as follows.

Rights of Advowsons shall be determined in the King's Court.

cap. 1.

This had been quarrelled from the first *Normans* time, but could never be recovered by the Clergy. Before the *Normans* time, the County-courts had them, and there they were determined before the Bishop and Sheriff; but the Ecclesiastical Causes being reduced to Ecclesiastical Courts, and the Sheriff and the Laity sequestered from intermeddling, the *Normans*, according to the custom in their own Country, reduced also the tryal of rights of advowsons unto the Supreme Courts: partly because the King's Title was much concerned therein, and the *Norman* Lords no less; but principally in regard that Rights require the consideration of such as are the most learned in the Laws.

Rights of Tythes of a Lay-fee, or where the Tenure is in question, belong to the King's Court.

cap. 2.

Pleas of Debts by troth-plight, belong to the King's Court.

cap. 3.

These were *Saxon* Laws, and do intimate, that it was the endeavour of the Clergy to get the sole cognizance of Tythes, because they were originally their dues; and of Debts by troth-plight, because that Oaths seemed to relate much to Religion, whereof they held themselves the only professors.

The King's Justice shall reform Errors of the Ecclesiastical Courts, and Crimes of Ecclesiastical Persons.

cap. 4.

Appeals shall be from Archdeacons Courts to the Bishops Courts, and thence to the Archbishops Courts, and thence to the King's Court, and there the Sentence to be final.

cap. 5.

No man that ever was acquainted with Antiquity, will question that these were received Laws in the *Saxons* time; nor did the Clergy ever quarrel them, till the *Normans* taught them by courtesy done to *Rome*, to expect more from Kings

Constit. at
Clarindon.

than

than for the present they would grant; whereof see *Cap. 47.* But King *Steven*, that was indebted to the Clergy for his Crown, and could not otherwise content them, parted with this Jewel of Supreme power in causes Ecclesiastical to the Roman cognizance, as hath been already noted; but *Henry* the second would have none of this Cheat at so easy a rate. This struck so smart a blow, as though the Popedom had but newly recovered out of a paralytick Schism, yet (seeing it so mainly concerned the maintenance of the Triple-Crown) *Alexander* the Pope having lately been blooded against a brave Emperor, made the less difficulty to stickle with a valiant King; who in conclusion was fain to yield up the Bucklers, and let the Pope hold what he had gotten, notwithstanding against this Law, and all former Law and Custom. And thus the Pope's Supremacy in Spiritual Causes, is secured both by a Recovery, and a Judgment by confession, thereupon.

Constit. at
Clarinda.

cap. 6.

The King shall have vacancies of Churches, and power to elect by his secret Council: The Party elected shall do homage salvo Ordine, and then shall be consecrated.

Vide ante.

Constit. at
Clarinda.

This certainly was none of the best, yet it was a custom not altogether against reason, although not suitable to the opinion of many; yet we meet two alterations of the ancient custom. First, that the election shall be by the King and *secret Council*; whereas formerly the election of Bishops and Archbishops was of such publick concernment, as the Parliament took cognizance thereof; and (that which was worse) a Council was hereby allow'd, called a *secret Council*, which in effect is a Council to serve the King's private aims; and unto this Council, power given in the ordering of the publick affairs, without advice of the publick Council of Lords, which was the only Council of State in former times. And thus the publick affairs are made to correspond with the King's private interest, which hath been the cause of much irregularity in the Government of this Island ever since. The second alteration resteth in the *salvo*, which is a clause never formerly allowed, unless by practice in *Steven's* time, whenas there was little regard of the one or the other: Nor doth it concur with the file of story, that it should be inserted within these Constitutions, seeing that Writers agree it was the chief cause of quarrel between him and *Becket*, who refused submission without the clause, and at which the King stuck with the Archbishop for the space of seven years, which was six years after the Constitutions were consented unto, and concluded upon.

cap. 7:

No Clergyman or other may depart the Realm, without the King's Licence.

M. Par.

It is a Law of Nations, and must be agreed on all hands, that no reason of State can allow dispensations therein, especially in a doubtful Government, where the supremacy is in dispute: and this the wilful Archbishop never questioned, till he questioned all Authority, but in order to his own; for but the year before, when he went to *Turon* to the general Council upon summons, he first obtained Licence from the King before he went.

cap. 8.

No Sentence of Excommunication or Interdiction to pass against the King's Tenant or any Minister of State, without Licence first had of the King, or his Chief Justice in the King's absence.

Till

Till the *Conquest*, no Excommunication passed without Warrant of Law made by the joint assembly of the Laity and Clergy; but the *Conqueror* having let loose the Canons, and the Clergy having got the upper hand in Councils, made Canons as they pleased, and so the Laity are exposed to the voluntary power of the Canon: only as well the *Normans*, as until these times, Kings have saved their own associates from that sudden blow, and upon reason of religious observance, lest the King should converse with excommunicate persons ere he be aware. Constit. at Clarindon.

The Laity are not to be proceeded against in Ecclesiastical Courts, cap. 9. but upon proof by Witnesses in the presence of the Bishop: and where no Witnesses are, the Sheriff shall try the matter by Jury in the presence of the Bishop.

A negative Law, that implieth another Course, was used upon light Fame or Suspicion *ex officio*, although the Oath at that time was not born into the World, and that all this was contrary to the liberty of the Subject, and Law of the Land: And it intimates a ground of prohibition in all such cases upon the Common Law; which also was the ancient course in the *Saxons* times, as hath been formerly noted.

Excommunicated persons shall be compelled only to give pledge, and not Oath, or Bail to stand to the Judgment of the Church. cap. 10.

Upon the taking and imprisoning of the party excommunicate, the course anciently was, it seemeth, to give pledge to stand to order. Of this the Bishops were weary soon, as it seemeth; and therefore waved it, and betook themselves to other inventions of their own, viz. to bind them by Oath or Bail; both which were contrary to Law: for no Oath was to be administered but by Law of the Kingdom; nor did it belong to the Ecclesiastical Laws to order Oaths or Bail; and therefore this Law became a ground of prohibition in such cases, and of the Writ *de cautione admittenda*. Constit. at Clarindon.

Persons cited, and making default, may be interdicted, and the King's Officer shall compel him to obey. cap. 11.

If the King's Officer make default, he shall be amerced, and then the party interdicted may be excommunicated.

So as the Process in the Spiritual Courts was to be regulated according to Law. Nor did it lie in the power of such Courts to order their own way, or scatter the censure of Excommunication according to their own liking. This, together with all those that forego, the Archbishop upon his repentance absolutely withstood, although he had twice consented, and once subscribed to them, having also received some kind of allowance thereof even from *Rome* itself. Constit. at Clarindon.

Clergymen holding per Baroniam, shall do such services as to their Tenure belong, and shall assist in the King's Court till judgement of Life or Member. cap. 12.

Two things are hereby manifest. First, that notwithstanding the *Conqueror's* Law formerly mentioned, Bishops still sat as Judges in the King's Courts, as they had done in the *Saxon* times; but it was upon causes that merely concerned the *Laity*; so as the Law of the *Conqueror* extended only to separate the *Laity* out of the *Spiritual Courts*, and not the *Clergy* out of the *Lay Courts*. Secondly, that the *Clergy*, especially those of the greater sort, questioned their services due by Tenure, as if they intended neither Lord nor King, but the Pope only. Doubtless the use of Tenures in those times was of infinite consequence to the peace of the Kingdom, and government of these Kings; whenas by these principally, not only all degrees were united and made dependant from the Lord *paramount* to the Tenant *paravale*, but especially the *Clergy* with the *Laity* upon the Crown; without which, a strange metamorphosis in Government must needs have ensued, beyond the shape of any reasonable conceit, the one half almost of the people in *England* being absolutely put under the Dominion of a foreign power.

cap. 13, 14.

Sanctuary shall not protect forfeited Goods, nor Clerks convicted or confessed.

This was Law; but violence did both now and afterwards much obliterate it.

Constit. at
Clarendon.
cap. 15.

Churches holden of the King shall not be aliened without Licence.

It was an ancient Law of the *Saxons*, that no Tenements holden by service could be aliened without Licence or consent of the Lord, because of the Allegiance between Lord and Tenant. Now there was no question but that Churches might lie in Tenure as well as other Tenements; but the strife was by the Churchmen, to hold their Tenements free from all humane service; which the King withstood.

cap. 16.

Sons of the Laity shall not be admitted into a Monastery without the Lord's consent.

Upon the same ground with the former: for the Lord had not only right in his Tenant, which could not be aliened without his consent, but also a right in his Tenant's Children, in regard they in time might by descent become his Tenants, and so lie under the same ground of Law: For although this be no alienation by legal purchase, yet it is in nature of the same relation; for he that is in a Monastery is dead to all worldly affairs.

These then are the rights that the King claimed, and the Clergy disclaimed at the first; although upon more sober consideration they generally consented unto the five last: But their Captain-Archbishop *Becket* withstood the rest, which cost him his life in the conclusion; with this honourable testimony, that his death, *Sampson*-like, effected more than his life: For the main thing of all the rest the Pope gained * to be friends, for the loss of so great a stickler in the Church-affairs as *Becket* was.

In

* Here seems an Omission in all the Editions, which I conceive should be thus supplied, (i. e. the Vacancies of Benefices, while the King was forced to intreat the Pope).

In this Tragedy the Pope observing how the *English* Bishops had forsaken their Archbishops, espied a muse through which all the game of the Popedom might soon escape, and the Pope be left to sit upon Thorns in regard of his Authority here in *England*. For let the Metropolitan of all *England* be a sworn servant to the Metropolitan of the Christian World, and the rest of the *English* Bishops not concur, it will make the Triple Crown at the best but double. *Alexander* the Pope therefore meant not to trust their fair natures any longer; but puts an Oath upon every *English* Bishop, to take before their consecration, whereby he became bound,

Antiq. Brit.
302.
Fox. An.
1179.

1. To absolute allegiance to the Pope and Romish Church.
2. Not to further by deed or consent any prejudice to them.
3. To conceal their Counsels.
4. To aid the Roman Papacy against all persons.
5. To assist the Roman Legate.
6. To come to Synods upon Summons.
7. To visit Rome once every three years.
8. Not to sell any part of their Bishoprick without consent of the Pope.

And thus the *English* Bishops that formerly did but regard *Rome*, now give their Estates, Bodies and Souls unto her service; that which remains, the King of *England* may keep: And well it was that it was not worse, considering that the King had vowed perpetual enmity against the Pope. But he wisely perceiving that the King's spirit would up again, having thus gotten the main battle, durst not adventure upon the King's rear, lest he might turn head: and so he let the King come off with the loss of *Appeals*, and an order to annul the customs that by him were brought in against the Church, which in truth were none.

M. Paris.
An. 1167.
Baronius An-
nal. 1164.
Sect. 11.

This was too much for so brave a King as *Henry* the second, to lose to the scare-crow-power of *Rome*: yet it befel him as many great spirits, that favour prevails more with them than fear or power: For being towards his last times worn with grief at his unnatural Sons, a shadow of the kindness of the Pope's Legate unto him, won that which the Clergy could never formerly wrest from him in these particulars granted by him: That,

M. Paris.
An. 1176.

No Clerk shall answer in the Lay-courts, but only for the Forest, and their Lay-fee.

This favoured more of courtesy than Justice, and therefore we find not that the same did thrive, nor did continue long in force as a Law, although the claim thereof lasted.

Vacancies shall not be holden in the King's hand above one year, unless upon case of necessity.

This seemeth to pass somewhat from the Crown, but lost it nothing; for if the Clergy accepted of this grant, they thereby allow the Crown a right to make it, and a liberty to determine its own right, or continuing the same by being sole Judge of the necessity.

3. *Killers of Clerks convicted, shall be punished in the Bishops presence by the King's Justice.*

In the licentious times of King *Steven*, wherein the Clergy played *Rex*, they grew so unruly, that in a short time they had committed above a hundred murders. To prevent this evil, the King, loth to enter the List with the Clergy about too many matters, let loose the *Law of feud*, for the friends of the party slain to take revenge; and this cost the blood of many Clerks: The *Laity* haply, being more industrious therein than otherwise they would have been, because the Ecclesiastical Judge for the most part favoured them. As an expedient to all which, this Law was made, and so the Clergy was still left to their Clergy, and Justice done upon such as fought their blood.

4. *Clergymen shall not be holden to trial by Battle.*

It was an ancient Law of the *Saxons*, and either by neglect worn out of use, or by the valour of the Clergy laid aside, as resolving rather to adventure their own blood, than to end their quarrel before the *Lay-Judge* by Plea: but grown weary of that course, and likely also put hard to the pinch upon Complaints made by them against *Clerk-slayers*, they are fain to have recourse to their ancient Privilege.

Hitherto therefore it is manifest the Clergy were in their growing condition, notwithstanding the policy and power of *Henry* the second, who was the Paragon of that age.

After him reigned *Richard* the first, that must expiate his disobedience to his Father, by obedience to his ghostly Father the Pope, in undertaking the holy War; and being gone, left the Government in his absence so deeply intrusted to the Clergy, as they could lose nothing of what they had gained, unless they would; and might have gained much more than they did or should, had not the Bishop that was the overseer of the whole Kingdom been drunken with vanity, and spued out his own shame. However the success was, it was not contrary to the principles of those times: for *Richard* had experience in the Emperor *Frederick* and his Father's example, that the Pope and Clergy were too hard for all the Potentates in *Europe*, and therefore might most safely trust them with all he had at home, whilst he was in their service abroad. Nor were they short of what was intrusted to them, but stuck close for the maintenance of his Right to the Crown, and emptied themselves even to the very consecrated Vessels, and procured the *Laity* of all sorts to do the like, to save the Kingdom from the rape of strangers and usurpers, who esteem'd the King dead in Law, and as one buried alive.

Thus passed they to King *John* the Government, supposing themselves well enough assured of what they had gotten by their several achievements had under the Reigns of three several Kings successively: And King *John* might well enough have understood the times, if he had seriously considered them; but being heightened all his life-time with lawless Government, wherein he was trained up in *Ireland*, he knew not how to stoop, till he stooped so low as the Legate's Knee, and his Crown at the Pope's Foot; leaving an example to posterity to beware of striving with the Clergy.

If then these sparks of ambition were so violent being alone, certainly in their joint consultations much more. They had long striven now since the *Conquest* to have excluded the *Laity* from their *Synods*, and about these days effected it. And yet about *Henry* the second's time it may be supposed the thing either was not yet done, or so lately, that the Law was not clear in that point; for *Petrus Bleccensis*, who was Arch-deacon of *Bath* about those times, in his Epistle to the Arch-bishop of *York* concerning the restraint of the growing Sect of the Publicans, he adviseth in these words: *Accipite clerum, congregare populum, & ex eorum communi deliberatione, qui Spiritum Domini habent, terribilis constitutio promulgetur, &c.* And if the Historian doth not mistake, the proceedings against that Sect being only for errors in Religion, was in a Council of Bishops and Lords. Nevertheless, whether present or absent, the *Laity* sat there as Cyphers, making the number great, but not valuable by themselves. For even in the *Norman* times they were brought so low, as the Constitution made by the *Clergy* wrought more upon them, than *M. Westm.* civility itself can work upon professors of Religion in these days. For it seems *An. 1127.* excess of long Hair was grown to that measure, that the *Synod* cried out against it, and decreed that men should cut their Hair so as their Eyes and laps of their Ears might be seen; and the King himself, I mean *Henry* the first, submitted to this cut, and made all his Knights to do the like, and exposed themselves to the then-odious by-names of *Clowns* or *Priests*, (like to the Round-heads of these days) who formerly marched under the title of *Criniti* or *Ruffians*. This did but touch the Hair, but they went to the quick, when they decreed that Lords should not sell their Villains, and that Outlawries should pass in certain particular cases; as in the Constitutions of Archbishop *Anselm* may appear. Afterwards in these Kings *Antiq. Brit. 150. ibid. 155.* times they flew at the Throat of the Government, got all places of honour, or profit, or power, whether for Peace or War, under their gripe: deposed and advanced as they pleased, even to the Royal Throne itself: and that not only out of a sudden passion of State, but advisedly concluded for a maxim, That the election of the King belonged to them; as in the case of the election of *Maude* the *Bid. 127.* Empress, they did hold forth to all the World; and in which the King also then flattered them, as holding their Election so necessary, that he kept the whole *Synod* in duress to have their votes for the election of his Son to be his Successor.

C H A P. LX.

Of the English Commonalty since the Normans time.

THE dignity of the *English* Crown thus deflowred by the great men, was no loss to the common people: For as in all decays of Monarchy the great men get nothing if they please not the people, so the King can hold nothing if the people be not contented. And yet contented or not contented, they could not gain much; for as affairs stood then in the Christian world, the Politicians discourse of three kinds of Government proved idle; neither could *Monarchy*, *Aristocracy*, nor *Democracy*, attain any semblable condition in any place, so long as the Church held its design apart, and prevailed to have the greatest share in all; not now by the favour either of great or small, but by a pretended *divine right*, through which they

Of Judicature, the Courts, and their Judges,

they now had gotten to their full pitch of Lordship in the Consciences of men. It must be acknowledged that this was a distemper in Government; yet such it was, as kept humours low, and restrained the inordinate excesses that in all kinds of Government are subject to break forth; so as neither King, nor Lords, nor People could swell into larger proportion than would suit with the ends of the *Church-men*. But to mind the matter in hand: somewhat the *Commons* gained in these stormy times: the Taxes that they were charged with, were rather perswaded than imposed upon them; and generally they were sparing in that work; and it is noted for the honour of King *Steven*, that though he was seldom without War, yet he not only never charged the people with any Tax, but released that of *Dane-gelt*, and acquitted the Subject for ever of that Tax, which former Kings challenged as their right; all which shew him to be a brave King, if he was not a very rich man. *Henry* the second was more heavy, because he had more to do; yet find we but one assessment, which was *Escuage*, unless for the *holy War*, which was more the Clergy-mens than his. *Richard* was yet a greater burthen: his Reign was troublesome to him, and he deserved it; for from the beginning thereof to the ending, could never the guilt of his disobedience to his Father be blotted out: but it was more troublesome to the people, because it cost so much treasure, was managed by such ill Governors, (except the Archbishop of *Canterbury*) and was unsuccessful in most of his undertakings: yet never invaded the liberties of the *Commons* by any face of *Prerogative*. But what wanted in him, was made compleat and running over in his Successor *John*, who (to speak in the most moderate sense of his Government) being given over to himself, when he was not himself, robbed the Lords of their authority, bereaved the Church of his Rights, trod under foot the Liberties of the people, wasted his own *Prerogative*: and having brought all things into despair, comes a desperate cure; the head is cut off to save the body, and a precedent left for them that list to take it up in future ages. And thus that which *Steven* gave, *Henry* the second lost, *Richard* the first would not regain, and *John* could not; and so all were gainers but the Crown.

C H A P. LXI.

Of Judicature, the Courts, and their Judges.

IT is no silent argument that the *Commons* gain, where Laws grow into course: and it was the lot of these troublesome times to lay a foundation of a constant Government, such as all men might learn, which formerly was laid up only in the breasts of wise experienced men. The two most considerable points in Government, is the Law, and the Execution; the latter being the life of the former, and that of the Commonwealth. I say not that the Law was augmented in the body of it, or that the Execution had a freer course than in the best of the former times; but both were more and more cleared to the world in many particulars, as well touching matters concerning practice of the Law, as touching rules of righteousness. For the first whereof, we are beholden to *Glanvil* in *Henry* the second's time; and for the latter, to King *John*, or rather the Barons in his time, in the publishing of the *Grand Charter*, or an enumeration of the Liberties or Customs of the people derived

derived from the Saxons; revived, continued, and confirmed by the Normans and their Successors: which for the present I shall leave *in lance dubio*, to stand or fall, till occasion shall be of clearing the point, in regard that King John soon repented of his Oath, (the Bond of his consent) and to heal the Wound, got the Pope's pardon and blessing thereupon: so easy a thing it was for a Son of the Roman Church to pass for a good Catholick in an unrighteous way. [And some Doubt is left in History as to his Religion.]

The execution of the Law was done in several Courts, according to the several kinds of affairs, whereof some concerned matters of *Crime* and *Penalty*; and this touched the King's honour, and safety of the persons of himself and his Subjects, and therefore are said to be *contra coronam & dignitatem*, &c. The second sort concern the *profits* of the *Crown*, or treasure of the Kingdom. The third concern the *safety of the Estates of the people*. These three works were appointed unto three several Courts, who had their several Judges especially appointed to that work. Originally they were in one, *viz.* in the supreme Court of Judicature, the Court of Lords, whereof formerly was spoken; but after, through increase of affairs, by them deputed or committed to the care of several men that were men of skill in such affairs, and yet retained the Supremacy in all such cases still. And because that which concerned the *publick Treasure* was of more publick regard than the other, the deputation thereof was committed probably to some of their own mem-^{Gloss}bers, who in those days were *Barons* of the Realm, and afterwards retained the Title, but not the Degree; and therefore were called for distinction-sake, *Barons of the Exchequer*. The particular times of these deputations appear not clearly out of any monument of antiquity; nevertheless it is clear to me that it was before Henry the second's time, as well because Henry the first had his *Judex fiscalis*, as ^{LI. Hen. 1.} *Glanvil* so frequently toucheth upon the King's Court of Pleas, which cannot be ^{c. 24.} intended at the Court of Lords; for that in those days was never summoned but in time of Parliament, or some other special occasion. But more principally because the historian speaking of the Judges *itinerant*, reciteth some to be of the *Common-Hovedens* ^{pleas}; which sheweth that there was in those days a distinction of Jurisdiction in Judicatures. And it may very well be conceived that this distinction of Judicature was by advice of the Parliament after that the *Grand Council* of Lords was laid aside by Kings, and a *Privy-Council* taken up, unto whom could not regularly belong any juridical power, because that remained originally in the grand assembly of the Lords.

Over these Courts, or two of them, one man had the prime Title of *Chief Justice*, who then was called *Lord Chief Justice of England*, and whose office was much of the nature of the King's Lieutenant in all causes and places, as well in War as Peace; and sometimes was appointed to one part of the Kingdom, and by reason thereof had the name only of that part, and some other of the other parts. The greatness of this Office was such, as the man for necessity of state was continually resident at the Court, and by this means the King's Court was much attended by all sorts of persons; which proved in after-times as grievous to the King, as it was burthensome to the people. Other Judges there were, which were chosen for their learning and experience, most of them being of the *Clergy*, as were also the Under-Officers of those Courts; for those times was *Rome's* hour, and the power of darkness.

Other Courts also were in the Country, and were *Vicontiel* or Courts of Sheriffs, and

Hoveden.

and Lords of Hundreds and Corporations, and Lordships, as formerly; and these were settled in some place. But others there were, which were *itinerant*, over which certain Judges presided, which were elected by the Grand-Council of Lords, and sent by Commission from King *Henry* the second throughout the Kingdom, then divided into Six Circuits, unto each of which was assigned Three Justices; so as the whole number of Justices then was Eighteen. The office was before the coming of the *Saxons* over hither, but the assignation was new: as also was their Oath, for they were sworn. But the number continued not long, for within four years the King re-divided the Land into four Circuits, and unto each Circuit assigned five Justices, making in the whole the number of twenty and one Justices; for the *Northern Circuit* had six Justices, which the King made Justices of the *Common-pleas* throughout the Kingdom. Neither yet did the first Commission continue so long as four years; for within that time *Richard Lucy* one of the Justices had renounced his Office and betaken himself to a Cloister, and yet was neither named in the first Commission nor in the latter: nor did the last Commission continue five years; for within that time *Ralph Glanvil* removed from the *Northern Circuit* to that of *Worcester*, as by the story of *Sir Gilbert Plumpton* may appear, though little to the honour of the Justice of the Kingdom, or of that Judge, however his book commended him to posterity. I take it upon the credit of the Reporter, that this *itinerary* judicature was settled to hold every seven years; but I find no monument thereof before these days.

Hoved. 137.
Ibid. 445.Hoveden, An.
1184.

Co. jur. 33.

Hoveden.
Glanvil. l. 14.
c. 7.Glanv. lib. 1.
cap. 2.Idem. lib. 9.
& 10.

As touching their power, certainly it was in point of judicature as large as that of the Court of Lords, though not so high: It was as large, because they had cognizance of all Causes both concerning the *Crown* and *Common-pleas*. And amongst those of the *Crown* this only I shall note, that all manner of falsehood was inquirable by those Judges, which after came to be much invaded by the *Clergy*.

I shall say no more of this, but that in their original these *Iters* were little other than visitations of the Country by the grand Council of Lords. Nor shall I add any thing concerning the *Vicontiel* Courts and other inferiour but what I find in *Glanvil*; that though Robbery belonged to the King's Court, yet Thefts belonged to the Sheriff's Court; and (if the Lords Court intercepts not) all batteries and woundings, unless in the complaint they be charged to be done *contra pacem Domini Regis*: the like also of inferiour *Trespases*, besides *Common-pleas*, whereof more shall follow in the next Chapter as occasion shall be.

C H A P. LXII.

Of certain Laws of Judicature in the time of Henry the Second.

AND hereof I shall note only a few as well touching matters of the *Crown* as of property, being desirous, to observe the changes of Law with the times, and the manner of the growth thereof to that pitch which in these times it hath attained.

We cannot find in any story, that the *Saxon Church* was infested with any *Heresy*,^{1.} from their first entrance, till this present Generation. The first and last *Heresy* that ever troubled this Island, was imbred by *Pelagius*; but that was amongst the *Britons*, and was first battered by the Council or Synod under *Germanus*; but afterwards suppressed by the Zeal of the *Saxons*, who liked nothing of the *British* breed, and for whose sake it suffered more haply than for the foulness of the opinion. The *Saxon Church*, leavened from *Rome* for the space of above five hundred years, Hoveden. held on its course, without any intermission by cross Doctrine springing up, till^{585.} the time of *Henry* the second. Then entred a Sect whom they called *Publicans*, but were the *Albigenses*; as may appear by the decree of Pope *Alexander*, whose opinions I shall not trouble my course with: but it seems they were such as crossed their way, and *Henry* the second made the first precedent of punishing *Heresy* in the Kingdom, under the name of this Sect; whom he caused to be brought before a Council of Bishops, who endeavoured to convince them of their error; Nubrig lib. 2. but failing therein, they pronounced them *Hereticks*, and delivered them over to^{cap. 13.} the *Lay-power*; by which means they were branded in the forehead, whipped, and exposed to extremity of the cold, (according to the decree of the Church) died*. This was the manner and punishment of *Hereticks* in this Kingdom in^{i. e. were} those days; albeit it seemeth they were then decreed to be burnt in other Coun-^{murthere.} tries, if that Relation of *Cogshall* be true which *Picardus* noted upon the 13th^{Decret. Papæ} Chapter of the History of *William* of *Newbery*, out of which I have inserted this^{Alexand.} Relation.^{Hoveden.}^{585.}

Another Case we meet with in *Henry* the second's time, concerning *Apostacy*,^{2.} which was a Crime that as it seems died as soon as it was born; for besides that one, *Apostacy*. we find no second thereto in all the file of *English* story. The particular was,^{Bracton, lib. 3.} that a *Clerk* had renounced his Baptism, and turned *Jew*; and for this was con-^{cap. 9.} victed by a Council of Bishops at *Oxford*, and was burned. So as we have *Apostacy* punished with death, and *Heresy* with a punishment that proved mortal; and the manner of conviction of both by a Council of the Clergy, and delivered over to the *Lay-power*, who certainly proceeded according to the direction of the *Canon*, or advice of the [Ecclesiastical] Council. These (if no more) were sufficient to demonstrate the growing power of the Clergy, however brave the King was against all his Enemies in the field.

Treason was anciently used only as a Crime of breach of Trust or *Fealty*, as^{3.} hath been already noted; now it grows into a sadder temper, and is made all one^{Treason.} with that of *læsa Majestas*; and that Majesty that now-a-days is wrapped up wholly in the person of the *King*, was in *Henry* the second's time imparted to the *King and Kingdom*, as in the first times it was more related to the *Kingdom*. And therefore *Glanvil* in his book of Laws, speaking of the Wound of *Majesty*,^{Lib. 1. c. 2.} exemplifies *Sedition* and destruction of the *Kingdom*, to be in equal degree a Wound^{Lib. 10. c. 1.} of *Majesty* with the destruction of the person of the *King*: and then he nameth *Sedition* in the Army, and *fraudulent* conversion of *Treasure-trove*, which properly belongs to the King. All which he saith are punished with Death and forfeiture of Estate, and corruption of Blood; for so I take the meaning of the words in relation to what ensueth.

Felonies, of *Manſlaughter*, *Burning*, *Robbery*, *Raviſhment*, and *Fauſonry*, are to^{4.} be punished with loss of Member and Estate.^{Felonies.}

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This

This was the Law derived from the *Normans*, and accordingly was the direction in the Charge given to the Justices *itinerant* in *Henry* the second's time, as appeareth in *Hoveden*. But *Treason* or Treachery against the Oath, Fealty, or Bond of Allegiance, as of the Servants against the Lord, was punished with certain and with painful deaths: And therefore though the murder of the King was *Treason*, yet the murder of his Son was no other than as of another man, unless it arose from those of his own Servants. The penalty of loss of Estate, was common both to *Treason* and *Felony*; it reached even unto *Thefts*; in which case the forfeiture, as to the Moveables, was to the Sheriff of the County, unto whose cognizance the case did belong: and the Land went to the Lord immediately, and not to the King. But in all cases of *Felony*, and of a higher nature, the party (though not the King's Tenant) lost his personal Estate to the King for ever, his Free-holds also for a year and a day: after which, they returned to the Lord of the Soil, by way of Escheat. It seemeth also, that the loss not only of Chattles and Goods, but also of Lands, &c. extended to *Out-lawries* (I conceive in case of *Felony*;) and the King's Pardon in such case could not bind the Lord's right of Escheat, although it might discharge the Goods, and the year and day whereunto the King was entitled: which case alone sufficiently declareth what power Kings had in the Estates of their Subjects.

11. Hen. 1.
cap. 25.

11. Hen. 1.
cap. 79.

Glanv. lib. 7.
c. p. 17.

Manlaughter made notailable.

Manlaughter.
Glanv. lib.
14 c. 1, & 3.

This was Law in *Henry* the second's time, although it crossed the *Norman* Law; and questionless it was upon good ground; for the times now were not as those in the *Conqueror's* times, when shedding of Blood was accounted Valour, and in most cases in order to the publick service. And now it seems it was a growing evil, and that cried so loud, as though in case of *Treason* bail might be allowed, yet not in this case, *ubi ad terrorem aliter statutum est*, saith the Author.

6.
Robbery.

Robbers shall be committed to the *Sheriff*, or in his absence to the next *Castelane*, who shall deliver him to the *Sheriff*, and the *Justices* shall do right to them, and unto *Trespasgers* upon Land.

11. Gulielm.
4.
Spicil. 174.
Glanv. lib.
14. cap. 1.

By the *Conqueror's* Law these offenders wereailable; and I conceive this was no Repeal thereof; and the rather, because *Glanvil* alloweth of Pledges in all cases (except *Manlaughter*) yea in those Crimes that did wound *Majesty* itself, although they concern the destruction of the King's person, or *Sedition* in the Kingdom or Army thereof. The Justices herein mentioned, were intended to be the Justices *itinerant*; and the *Trespasgers* upon Land, are meant such as are *contra pacem Domini Regis*, as riotous and forcible Entries: for some *Trespasgers* were against the peace of the Sheriff, as formerly hath been observed.

7.
Fauxonary.
Glanv. lib.
14. cap. 7.

Fauxonary is of several degrees or kinds: some against the King, others against other men; and of those against the King, some are punished as Wounds of *Majesty*, as *falsifying the King's Charter*: and whether *falsifying of Money* were in that condition or not, I leave; or *falsifying of Measures*, yet more inferiour, I cannot determine; but it is clear by *Glanvil*, that *falsifying of the Deed* of a private person, was of smaller consideration, and at the utmost deserved but loss of Member.

Inheritances may not be aliened.

Inheritances were in those times of Lands or Goods; for it was the custom then, that the personal Estate (the Debts deducted) was divisible into three parts; one whereof belonged in right to the Wife as *her reasonable part*, the other to the *Heir*, and a third to the *Testator* to make his Will of them, and of the other two parts he could not dispose by Will. Concerning Lands, it was regularly true, that no man could alien his whole Inheritance to the disherison of his Heir, either by Act in his life-time, or any part thereof by his last Will, without the concurrence of the Heir. But of purchased Lands he may give part by Act executed in his life-time, though he have no Lands by inheritance, and if he hath no Issue, then he may alien all. And where a man hath Lands by inheritance, and also by purchase, he may alien all his purchased Lands as he pleaseth. If the Lands be holden in *Gavel-kind*, no more of the Inheritance can be conveyed to any of the Children, than their proportionable parts will amount unto. This law of inheritance was diverse, according to the Tenure: for the Lands in Knights-service always descended to the Heir; but such as were holden in Soccage passed according to the custom, either to the eldest, or to the youngest, or to all equally. And thus stood the general state of Inheritance from the *Normans* time hitherto, seeming somewhat too strait for the *Free-men*, that by Law of Property might challenge a power to do with their own as they pleased. But the *Normans* saw a double prejudice herein: the first was the danger of ruin of many of their Families, who now ingrafted into the *English* stock, and yet not fully [consolidated], one might expect a late check to their preferments from the *Saxon* Parents, after a long and fair semblance made of their good Will. The second prejudice was their decay of their *Militia*, which was maintained by Riches more than by multitude of men: partly because that rich men are most fearful of offending, and therefore ordinarily are most serviceable both with their Bodies and Estates against publick dangers; and partly because by their Friends and Allies they bring more aid unto the publick, by engaging them in the common Cause, that otherwise might prove unsensible of the condition of their Country.

8.
Glan. lib. 7.
cap. 1.
Ibid. c. 5.

Ll. Hen. 1.
cap. 88.

9.
Vide Glanv.
l. 7. c. 9.

The Heir of a Free-man shall by descent be in such seisin as his Ancestor had at the time of his death, doing service, and paying relief; and shall have his Chattles.

If the Heir be under age, the Lord shall have the Wardship for the due time, and the Wife her Dower and part of the Goods.

If the Lord with-hold seisin, the King's Justice shall try the matter by twelve men.

The first of these branches is declaratory of a ground of common Law; but being applied to the last, is an introduction of a new Law of tryal of the Heir's Right by Affize of *Mortdancestor*, where formerly no remedy was left to the Heir, but a *Writ of Right*. If these three branches be particularly observed, they speak of three sorts of Heirs; of *Tenants by Knight-service*, viz. such as are *Majors*, or of full age; and such as are *Minors*, or under age; and such as are of a doubtful age. Those that are of full age at the death of their Ancestors, may possess the Lands descended, and the Lord may not disseize him thereof; but may be resisted by the Heir in the maintenance of his possession, so as he be ready to pay *Relief*, and do the service that is due: and if the Lord expel him, he shall have remedy by Affize. Those Heirs that are *Minors*, shall be under the Lord's guardianship till they come to one and twenty years. The Heirs of such as hold by

Socage, are said to be at full age at fifteen years, because at that age they were thought to be able to do that service; but the Sons of Burgeffes are then said to be of full age, when they have ability to manage their Father's Calling, such as telling of Money, measuring of Cloth, and the like: yet doth not *Glanvil*, or any other, say that these were their full age to all purposes; albeit that some Burroughs at this day hold the last in custom to all intents whatsoever. The last branch provided the remedy to recover to the Heir his possession in case it be detained, either through doubtfulness of age of the Heir, or his Title; and it directs the Issue to be tryed by twelve men. This tryal some have thought to be of *Glanvil*'s invention; and it may well be that this tryal of this matter, as thus set down, was directed by him: yet he useth often in his book the word *folet*, and in his Preface saith, That he will set down *frequentius usitata*; and it is past question, but that the tryal by twelve men was much more ancient, as hath been already noted. One thing more yet remaineth, concerning the Widow of the Tenant, whose Dower is not only provided for, but her reasonable part of her Husband's personal Estate. The original hereof was from the *Normans*, and it was as popular as that of Wardships was *Regal*; and so they made the *English* Women as sure to them, as they were sure of their Children.

10. The Justices shall by assize try Disseifins done since the King's coming over Sea, next after the peace made between him and his Son.

Glanv. lib.
13. cap. 33.

This is called the *Assize of Novel disseifin*, or of disseifins lately made. It seems that the limitation was set for the Justices sake, who now were appointed to that work which formerly belonged to the *County-courts*; and to prevent intrenchments of Courts, a limitation was determined, although the copy seemeth to be mistaken: for the limitation in the Writ is from the King's last Voyage, or going into *Normandy*.

11. Justices shall do right upon the King's Writ for half a Knight's Fee, and under, unless in cases of difficulty, which are to be referred to the King.

The Justices *itinerant*, ended the smaller matters in their Circuits; the other were reserved to the King in his Bench.

12. Justices shall enquire of Escheats, Lands, Churches, and Women, in the King's gift: And of Castle-guard, who? how much? and where?

*See Mat.
Paris per
Watts. p.
360. Sub pra-
textu Justitiae
Pecuniam
collegerant
&c.

So as the Judges *itinerant* had the work of Escheators; and made their Circuits serve as well for the King's * profit, as justice to the Subjects. They used also to take *Fealty* of the people to the King at one certain time of the year, and to demand *Homage* also. These matters of the King's *Exchequer* made the presence of the Judges less acceptable, and it may be occasioned some kind of oppression. And as touching *Castle-guard*, it was a Tenure in great use in these bloody times; and yet it seemeth they used to take Rent instead of the personal service, else had that enquiry (how much?) been improper.

13. Of a Tenant's holding, and of several Lords.

That one man may hold several Lands of several Lords, and so owe service to them all, is so common, as nothing can be more: nevertheless it will not be altogether out of the way, to touch somewhat upon the nature of this mutual relation

tion between Lord and Tenant in general, that the true nature of the diversity may more fully appear. The foundation or subject of service was a piece of Land, or other Tenement, at the first given by the Lord to the Tenant, in affirmance of a stipulation between them presupposed, by the giving and receiving whereof the Tenant undertook to perform service to the Lord, and the Lord undertook protection of the Tenant in his right to that Tenement. The Tenant was first by service solemnly bound, either by Oath, which the Lord or his Deputy by the Common-Law hath power to administer; as in the case of *Fealty*, in which the Tenant bound himself to be true to the honour and safety of his Lord's person, and to perform the service due to the Lord for the Tenement so given; or otherwise by the Tenant's humble acknowledgement, and promise not only to perform the services due, but even to be devoted to the Lord's service, to honour him, and to adventure limb and life, and be true and faithful to the Lord. This is called *Homage*, from those words, *I become your man Sir*; and yet promiseth upon the matter no more but *Fealty* in a deeper complement, albeit there be no difference in the adjuncts belonging to each. For though it be true that by promise of being the *Lord's man*, a general service may seem to be implied, yet in regard that it is upon occasion only of that present Tenure, it seemeth to me that it is to be restrained only to those particular services which belong to that Tenement; and therefore if that Tenement be holden in *Socage*, although the Tenant be bound to *homage*, yet that *homage* ties not the Tenant to the service of a *Knight*; nor contrarily doth the *homage* of a Tenant in *Knights-service* tie him to that of *Socage* upon the command of his Lord, though he professeth himself to be *his man*. Nor doth the Tenant's *homage* bind him against all men, nor *ad semper*; for in case he holdeth of two or divers Lords by *homage* for several Tenements, and these two Lords be in War one against the other, The Tenant must serve his chief Lord of whom the Capital house is holden; or that Lord which was his by priority, who may be called the chief Lord, because having first received *homage* he received it absolutely from his Tenant, with a saving of the Tenant's Faith made to other Lords and to the King: who in order to the publick had power to command a Tenant into War against his own Lord. If therefore he be commanded by the King in such cases unto War, he need not question the point of forfeiture; but if he be commanded by a chief of his other Lords into War, against a party in which another of his Lords is engaged, his safest way is to enter upon the work, because of his Allegiance to that Lord, yet with a *salvo* of his *fealty* to that other Lord. But in all ordinary cases, Tenants and Lords must have regard to their stipulation, for otherwise, if either break, the other is discharged for ever; and if the fault be in the Tenant, his Tenement *escheats* to his Lord; and if the Lord fail, he loses his Tenure, and the Tenant might thenceforth disclaim, and hold over for ever. Nevertheless the Lords had two Privileges by common custom belonging to their Tenures, which although not mentioned in the stipulation, were yet more valuable than all the rest; the one concerning matter of profit, the other of power: That of profit consisted in *aids* and *relief*. The *aids* were of three kinds, one to make the Lord's eldest Son *Knight*, the other to marry his eldest Daughter; the third to help him pay a *relief* to his Lord Paramount; which in my opinion sounds as much as if the Tenants were bound by their Tenures to *aid* their Lords in all cases of extraordinary charge (saving that the Lord could not distrain his Tenant for *aid* to his

Homage and Fealty.

Glanvil. l. 9. c. 4.

Lit. lib. 2. c. 5.

Glanvil. l. 9. cap. 1. l. 7. cap. 10.

Glanvil. l. 9. cap. 1.

Ibid. cap. 4.

Aids and Reliefs.

Ibid. c. 8.

vide post 162.

173. Glanvil. l. 9. c. 8.

Ibid.

Ibid.

Glanv. 7. 10.
Ibid. c. 12.

his War) and this according to the Lord's discretion; for *Glanvil* saith that the Law determined nothing concerning the quantity of value of these *aids*. These were the *Norman* ways, and favoured so much of *Lordship*, that within that age they were regulated: But that of *reliefs* was an ancient sacrifice; as of *first-fruits* of the Tenement to the Lord, in memorial of the first Lord's favour in conferring that Tenement; and it was first settled in the *Saxons* time. The Lords Privilege of power extended so far, as to distrain his Tenants into his own Court to answer to himself, in all causes that concerned his right; and so the Lord became both Judge and Party; which was soon felt and prevented, as shall appear hereafter. Another privilege of the Lord's power, was over the Tenant's Heir after the Tenant's death, in the disposing of the body during the *minority* and *marriage* of the same. As touching the disposing of the Body, the Lord either retained the same in his own power, or committed the same to others; and this was done either *pleno jure*, or rendering an account. As concerning the *marriage* of the Females that are Heirs, or so apparent, the Parents in their life-time cannot marry them without the Lords consent; nor may they marry themselves after their Parents death, without the same: and the Lords are bound to give their consent, unless they can shew cause to the contrary. The like also of the Tenants *Widows* that have any Dowry in the Lands of such Tenure. And by such-like means as these, the power of the *Barons* grew to that height, that in the lump it was too massy both for *Prince* and *Commons*.

Of the power of the last Will,

1. It is a received opinion, that at the common Law no man could devise his Lands by his *last Will*. If thereby it be conceived to be against common reason, I shall not touch that; but if against custom of the ancient times, I must suspend my concurrence therewith, untill those ancient times be defined: for as yet I find no testimony sufficient to assert that opinion; but rather that the times hitherto had a sacred opinion of the *last Will*, as of the most serious, sincere, and advised declaration of the most inward desires of a man; which was the main thing looked unto in all Conveyances, *Voluntas donatoris de cetero observetur*. And therefore nothing was more ordinary than for Kings in these times, as much as in them did lie, to dispose of their Crowns by their *last Will*. Thus King *John* appointed *Henry* the third his Successor; and *Richard* the first devised the Crown to King *John*; and *Henry* the first gave all his Lands to his Daughter; and *William* the Conqueror by his *last Will*, gave *Normandy* to *Robert*, *England* to *William*, and to *Henry* his Mother's Lands. If then these things of greatest moment under Heaven were ordinarily disposed by the *last Will*, was it then probable, that the smaller Free-holds should be of too high an esteem to be credited to such Conveyances? I would not be mistaken, as if I thought that Crowns and Empires were at the disposal of the *last Will* of the possessor; nor do I think that either they were thus in this Kingdom, or that there is any reason that can patronize that opinion; yet it will be apparent that Kings had no slight conceit of their *last Will*, and knew no such infirmity in that manner of conveyance, as is pretended; or else would they never have spent that little breath left them in vain. I have observed the words of *Glanvil* concerning this point, and I cannot find that he positively denieth all conveyance of Land by *Will*, but only in case of disherison; the ground whereof is, because it is contrary to the conveyance of the Law; and yet in that case also alloweth of a dis-

M. Paris.
An. 1216.
Hoveden.
An. 1199.
Malmsh. nov.
l. 1.
Malmsh. l. 3.Glanvil. l. 7.
cap. 1. & 5.

disposing power by consent of the Heir ; which could never make good conveyance, if the *Will* in that case were absolutely void, and therefore his Authority lies not in the way. Nor doth the particular customs of places discountenance, but rather advance this opinion: for if devises of Lands were incident to the Tenure in *Gavel-kind*, and that so general in old time, as also to the burgage Tenures, which were the rules of Corporations and Cities, *Ubi Leges Angliæ deperiri non possunt, nec defraudari, nec violari*, how can it be said contrary to the common Law? Ll. Gulielm. cap. 61. And therefore those Conveyances of Lands by *last Will*, that were in and after these times holden in use, seem to me rather remnants of the more general custom, wasted by positive Laws, than particular customs growing up against the common rule. It is true, that the *Clergy* put a power into the Pope to alter the Law, as touching themselves in some cases: for Roger Archbishop of York procured a faculty from the Pope to ordain that no Ecclesiastical person's *Will* should be good, unless made in health, and not lying in extremity; and that in such cases the Archbishop should possess himself of all such parties goods: but as it lasted not long, so was himself made a precedent in the case; for being overtaken with death e'er he was provided, he made his *Will* in his sickness, and Henry the second possessed himself of his Estate. And it is as true, that *Feme covert*s in these days could make no *Will* of their *reasonable part*, because by the *Saxon Law* it belonged jointly to the Children. Nor could *Usurers* continuing in that course at the time of their death, make their *Will*, because their personal Estate belonged to the King after their death and their Lands to their Lords by *escheat*, although before death they lie open to no censure of Law: but this was by an especial Law made since the *Conqueror's* time; for by the *Saxon Law* they were reputed as *Out-Laws*. Nevertheless, all these do but strengthen the general rule, viz. That regularly the *last Will* was holden in the general a good conveyance in Law. If the *Will* were only intended and not perfected, or no *Will* was made, then the Lands passed by descent, and the goods held course according to the *Saxon Law*, viz. the next Kinsman and Friends of the intestate did administer, and as administrators, they might sue by Writ out of the King's Court, although the Clergy had now obtained so much power, as for the recovery of a Legacy, or for the determining of the validity of the *Will* in its general nature, it was transmitted to the *Ecclesiastical Court*. M. Paris. An. 1181. Hoved. An. 1181. Decret. Alex. Pap. Hoveden. fol. 587. Glanv. l. 7. cap. 5. & 16. Ll. Edw. 37. Glanv. l. 7. cap. 6. cap. 8.

C H A P. LXIII.

Of the Militia of this Kingdom during the Reign of these Kings.

I Undertake not the debate of right; but as touching matter of fact shortly thus much: that from the *Norman* times the power of the *Militia* rested upon two principles; the one the Allegiance for the common defence of the King's person and honour, and Kingdom; and in this case the King had the power to levy the force of the Kingdom: nevertheless the cause was still under the cognizance of the great Council, so far as to agree or disavow the War, if they saw cause; as appeared in the defections of the *Barons* in the quarrel between King Steven and the

Of the Militia of the Kingdom.

the Empress, and between King *John* and his *Barons*. The other principle was the service due to the Lord from the Tenant, and by virtue hereof (especially when as the liberty of the Commons was in question) the *Militia* was swayed by the Lords, and they drew the people in Arms either one way or the other, as the case appeared to them: the experience whereof the Kings from time to time felt, to their extreme prejudice, and the Kingdom's damage. Nor did the former principle overway the latter, although it might seem more considerable, but only in the times of civil peace, when the Lords were quiet, and the people well-conceited of the King's aims in reference to the publick; which happiness it was *Henry* the Second's lot to enjoy: for he being a Prince eminent amongst Princes both for endowments of Mind and of outward estate, not only gained honour abroad, but much more amongst his own people at home, who saw plainly that he was for foreign employment of honour to the Kingdom; and not only contented with what he had in *England*, but imbarqued together with the *Laity* against the growing power of the *Clergy*, for the defence and honour of the privileges of the Crown, wherein also the *Liberties of the people* were included. They therefore were secure in the King's way, and suffered themselves to be engaged unto the Crown further than they or their Ancestors formerly had been, out of pretence of sudden extreme occasions of the Kingdom, that would not be matched with the ordinary course of defense. For the King (finding by former experience that the way of Tenures was too lame a supply for his acquests abroad, and that it had proved little better than a broken reed to the Crown in case of dispute with the people) aimed at a further reach than the *Lords* or *Commons* foresaw; and having learned a trick in *France*, brought it over (although it was neither the first nor last trick that *England* learned to their cost from *France*) which was a new way of levying of Men and Arms for the War, by assessing upon every *Knight's Fee*, and upon every *Free-man* of the value of sixteen Marks yearly, their certain Arms; and upon every *Free-man* of ten Marks yearly value, their certain Arms; and upon every *Burges*s and *Free-man* of an inferiour value, their certain Arms. 2. That these should be ready prepared against a certain day. 3. That they should be kept and maintained from time to time in the King's Service, and at his command. 4. That they should not be lent, pledged, sold, or given away. 5. That in case of death they should descend to the Heir, who if under age, should find a man to serve in his stead. 6. That in case the owner were able, he should be ready at a certain day with his Arms for the service of the King, *ad fidem Domini Regis & Regni sui*. 7. That unto this every man should be sworn. I call this a new way of levying of Arms and Men, not but that formerly other *Free-men* and *Burges*ses found Arms, albeit they held not by *Knight-service*; for it was so ordained by the Conqueror's Laws formerly used: but now the King thrust in two clauses (besides the altering of the Arms) the one concerning the Oath whereby all men became bound; the other concerning the raising and ordering of Men and Arms, which here seems to be referred to the King only, and in his service; and this I grant may imply much in common capacity, viz. that all the power of the *Militia*, is in *Henry* the Second. But this trick caught not the people according to the King's meaning: for the words *ad fidem Regis & Regni* still left a muse for the people to escape if they were called out against their duty to the Kingdom; and taught the doctrine which

Hoveden.
c. 181.

which is not yet repealed, viz. That what is not according to their Faith to the Kingdom, is not according to their Faith to the King. And therefore they could find in their hearts sometimes to sit still at home, when they were called forth to War: as may appear in one passage in the days of King *John*, who had gathered together an Army for the opposing of foreign Power, at such time as the Pope had done his worst against him and the whole Kingdom; which Army was of such considerable strength, as I believe none since the *Conquest* to this day exceeded or parallel'd it: But the King's mean submission to the Pope's Legat so distast'd the Nobles and People, as they left him to his own shifts; and that in such manner, as although afterwards he had advantage of them, and liberty enough to have raised an Army to have strengthened himself against the Nobles, yet the Lords coming from *London*, brought on the sudden such a party as the King was not able to withstand; and so he came off with that conclusion made at *Renny-mead*, which though in itself was honourable, yet lost the King so much the more, because it was rather gained from him, than made by him.

C H A P. LXIV.

Of the Government of Henry the third, Edward the first, and Edward the second, Kings of England. And first a general view of the disposition of their Government.

ONE hundred and ten years more I have together taken up, to add a period to this first part of discourse concerning *English* Government; principally because one spirit of arbitrary rule from King *John*, seemeth to breath throughout the whole, and therewith did expire.

The first that presents himself is *Henry* the third, begotten by King *John* when he was in the very first enterprize of oppression that occasioned the first *Barons* bloody Wars, and which this King was so miserable as to continue for the greatest part of his Life and Reign, and yet so happy as to see it ended about four years before he died. Although the soul be not ingendred from the parent, yet the temperature of the body of the Child doth sometimes so attemper the motion of the soul, that there is in the Child the very image of the Father's mind; and this *Henry* the third lively expressed, being so like unto his Father *John* in his worst course, as if his Father's own spirit had entred into him, and animated him in all his ways. He brought in with him the first precedent of Conscience in point of Succession by inheritance in the *English* Throne; for the stream of probabilities was against him. He was a Child, and the times required a compleat man, and a man for War. He was the Child of King *John* whose demerits of the State were now fresh in the minds of all men. He was also designed to the Throne by his Father's last Will; which was a dangerous precedent for them to admit, who had but even now withstood King *John*'s depositing the Crown in the Pope's hands, as not being in the power of a King of *England* to dispose of his Crown according to his own will. Yet [the People and some Nobles] leaping over all these considerations, and looking on *Henry* the third as the Child of a King, that by good nouriture might prove a wise and just King, they closed about this spark, in hope it might bring forth a flame whereby to warm themselves in stormy times. Nor

M. Paris.
An. 1216.

M. Paris.
An. 1223.

* the Earl of
Pembroke.

M. Paris.
An. 1223,
1224.

did their hopes soon perish; for, during his minority, the King was wise to follow good Counsel, and by it purged out all the ill humours that the Kingdom had contracted in the rash distempers of his Father's government. Nor did he only follow the counsels of others herein, but even at such times as their counsels crossed, he chose those Counsels that suited with the most popular way; as is to be seen in the different counsels of the Archbishop of *Canterbury* and *William Briwere*. And yet two things troubled much those times: one, that they were times of parties; the other, that the * Protector was somewhat too excellent to be a meer servant; and it is hard for the *English* Nobility to endure him to be greater; although it may seem reasonable that they that are thought worthy to govern a King, should be much more worthy to govern themselves. But the Pope put an end to all occasion of question hereabout; for by his Brief he declares the King to be sixteen years old, and of age to govern himself; and therefore all Castles are forthwith to be rendred up into the King's hands. This proved the rock of offence, whilst some obeyed the Pope, and were impugnors of those that put more confidence in the Castles than in the King's good-nature. Hence first sprang a civil broil, thence want of money, then a Parliament, wherein the *Grand Charter* of *England's* Liberties once more was exchanged for a sum of Money. Thus God wheeled about successes. But the King having passed over his tame age under the Government of wise Counsellors, and by this time beginning to feel liberty, it was his hard condition to meet with want of Money; and worse, to meet with ill Counsellors, which served him with ill advice, that the *Grand Charter* would keep him down, make him continually poor, and in a state of pupillage. To this giving credit, it shaped an Idea in his mind that would never out for forty years after; and thus advised, he neglects his own engagement, defies the Government, that by his Royal word, and the Kings his predecessors, in cool blood had been settled: and that he might do this without check of Conscience, he forbade the study of the Law, that so it might die without heir, and he have all by *Escheat*. This sadded the *English*, and made them drive heavily: the King (to add more strength) brought in Foreigners and foreign Councils; and then all was at a stand. The Councils were for new ways. The great design was to get money to supply the King's wants; and as great a design was to keep the King in want: otherwise it had been easy for those at the helm to have stopped the course of Foreigners (other than themselves) from abroad; the confluence of the Queen's poorer Allies, lavish entertainments, profuse rewards, cheats from *Rome*, and all this in necessitous times. But strangers, to maintain their own interests, must maintain strangeness between the King and his Subjects. To supply therefore these necessities, all shifts are used, as *revoking of Charters*, *displacing of Officers*, and *fining them*, *Afforestations*, with a train of oppressions depending thereon, *Fines* and *Amercements*, *corrupt Advancements*, *Loans*, and many tricks to make rich men offenders, especially projects upon the City of *London* *. Nevertheless all proved infinitely short of his disbursements; so as at times he is necessitated to call Parliaments, and let them know his wants. At the first the people are sensible, and allow supply; but after by experience finding themselves hurt by their supplies to the King, they grant upon conditions of renewing the power of the *Great Charter*; and many promises pass from the King to that end, and after that Oaths, and yet no performance: This makes the people absolutely

* See in the Preface to *Privilegia Londini* a brief abstract of this King's Extortions, &c.

lutely deny supplies. Then the King pretends Wars in *France*, Wars in *Scotland*, and Wars against the Infidels in the *Holy-Land*, whither he is going: the people upon such grounds give him *aids*; but finding all but pretences, or ill success of such enterprizes, they are hardned against supplies of him for the *Holy War*. Then he seems penitent, and pours out new promises, sealed with the most solemn execrations that are to be found in the Womb of Story, and so punctually recorded, as if God would have all generations to remember it as the seal of the Covehant between the King of *England* and his people; and therefore I cannot omit it.

It was done in full Parliament, where the Lords Temporal and Spiritual, Knights, *M. Paris.* and others of the Clergy, all standing with their Tapers burning; the King him-*An. 1253.* self also standing with a chearly countenance, holding his open hand upon his breast, the Archbishop pronounced this Curse ensuing:

By the authority of God omnipotent, of the Son, and of the Holy Ghost, and of the glorious Mother of God the Virgin Mary, and of the blessed Apostles Peter and Paul, and of all the other Apostles, and of the Holy Martyr and Archbishop Thomas, and of all the Martyrs, and of the blessed Edward King of England, and of all Confessors and Virgins, and of all the Saints of God:

We Excommunicate and Anathematize, and sequester from our holy Mother the Church, all those which henceforth knowingly and maliciously shall deprive or spoil Churches of their right.

And all those that shall by any art or wit rashly violate, diminish, or change, secretly or openly, in deed, word, or counsel, by crossing in part or whole those Ecclesiastical Liberties, or ancient approved customs of the Kingdom, especially the Liberties and free Customs which are contained in the Charters of the common Liberties of England, and the Forests, granted by our Lord the King to the Archbishops, Bishops, Prelates, Earls, Barons, Knights, and Free-holders.

And all those who have published, or being published have observed any thing against them or their Statutes, or which have brought in any customs, or being brought in* This seems to respect the Canon Law then lately introduced.*

shall judge by such things. All such as are knowingly guilty of any such matters, shall ipso facto incur this Sentence: such as are ignorantly guilty shall incur the same censure, if being admonished be amend not within fifteen days after admonition.

In the same censure are comprehended all perturbbers of the peace of the King and Kingdom: for everlasting memory whereof, we have bereunto put our Seals.

And then all throwing down their Tapers extinguished and smoaking, they said, *So let all that shall go against this curse be extinct, and sink in Hell. The King all the while continuing in the posture above-mentioned, said, So God me help, I will observe all these things sincerely and faithfully, as I am a Man, as I am a Christian, as I am a Knight, as I am a King crowned and anointed.*

If we shall pare away the superstitious ceremonies, and consider divine Providence, we may search into all Histories of all ages, and we shall not find a parallel hereunto; so seriously composed, solemnly pronounced, with an *Amen* from the representative body of the whole Kingdom, put in writing under seal, preserved to posterity; vindicated by God himself in the ruin of so many opposers. And yet the

The Government of Henry III. King of England.

the dust of time hath almost buried this out of the thoughts of men; so as few even of such as know it, do seriously consider how far it may yet and even now be charged upon the account of this Nation. Serious as it was, it was soon forgotten: nor would the King be long holden with promises, some unhappy Star struck him in his birth: he had been too hard for his promises; and now having the Pope at his Elbow, he can dispense with his Oath, and bid defiance to an * Execration: and in flat defiance of the *Grand Charter* professeth oppression, accumulates foreign Counsellors, and foreign Guards, contemns his own people, ushers in the Pope's Extortions upon them to fill up the measure: thrives in nothing but in the match of his Son and Successor with a Sister of *Spain*, and yet that also helps to hasten on the publick poverty, and that a Parliament that brought forth a bloody issue; although not by any natural power, but occasionally. For the *Barons* mean now no longer to trust to promises; strangers are banished the Realm, and others of the *English* blood stepped into their Places and Revenues. But this was not all, the King must confirm the *Grand Charter*; and thereto he addeth not only his own Oath, but causeth the Prince his Son to confirm the same in like manner. It is likewise propounded to him, that the chief Officers of the Kingdom may be chosen

† Which as to
the Officers of
the State was
the same Con-
dition.

Dan.

Dan. an. 1258.

such as the Parliament shall like of †. And that other Laws meet for the government of the Kingdom might be established: of all these the King made no bones. And to make men believe that he was in good earnest, he was contented to disrobe and disarm himself, and invest the *Barons* both with Sword and Scepter, retaining nothing but the Crown for himself. This had been safety enough for the Kingdom, but that it was a conclusion without an agreement; for as it was on the King's part made from a principle of shame and fear, so it was determined in anger; for after that the King had been thus drest and girt for the space of Four or Five years, (whatsoever he thought all the while it is no matter) he began first to stretch his Conscience, and having the Pope's Dispensation to help, soon makes his Oath to fly asunder (although his Son had for the present more Conscience.) But the other girt held more stoutly, for the Lords had the *Sword* chained to the Arm by the King's own grant. *Liceat omnibus in regno nostro contra nos insurgere, & ad gravamen nostrum opem & operam dare, ac si nobis in nullo tenerentur*; and the Lords maintained their hold, though not without some jealousies amongst themselves. And it is very probable had the King been a little longer breathed with patience, he might have had his will upon easier terms: for the Lords were not so jealous of one another as the Commons were jealous of the Lords, that they meant to rule only for themselves. But the King now being in a wood, and bemired, so as he must now resolve to get all or lose all, and so either sacrifice his natural desires, or the remainder of his politick power, entred the field with the aid of those Commons that chose rather to be oppressed by one King than many Lords. And thus the Lords received the first blow, and gave the first foil: Afterwards being worsted by their own divisions and jealousies, they left a victory to the King that might have made him absolute, if he had been moderate; but pursuing revenge too far, he was distasted of his own party that looked on him as a *Polyphemus* that intended to devour the Enemy first, that he might more freely feast upon themselves in the

* *Mat. Paris*, this King's own Historiographer, has given frequent Instances, quod impudentur fregit Sacramentum suum.

the issue. This made victory follow the King afar off, and taught the King that the end of Civil War must be attended with moderation in the Conqueror, so far as may stand with publick safety; or otherwise he that is Conqueror to-day by the Sword, may be conquered to-morrow by Jealousy. Thus many humours consumed, and all parts tired after four years continual War, the State cometh to its right Wits. The King's gains in all this bloody sweat may be summed up in two heads. First, that he had liberty to chuse his principal Officers of State by advice of the Lords, and them also displace by like Counsel. Secondly, in that he gained (though at a dear rate) wisdom to observe the state of affairs, and to apply himself according to occasion: so lived *Henry* the third for three or four years after these troubles; long enough to let the World know that he was able to govern like an *English* King, and to teach his Son by his own late experience to be a wise governor betimes.

For *Edward* the first being trained up in the Tragedy of a Civil War, wherein *Edward* 11. he was one of the chief actors; and having expiated the bloody way of his riotous youth by his *Holy War*, as they called it; now he betakes himself to amends making, by Justice in Government; having found by his Father's experience, that a Kingdom well governed (like good husbandry) preserves the owner, but being neglected destroys both.

He came over in his third year in *August*, was crowned in *September*, summoned a Parliament in *February* following, but adjourned it till after *Easter*: and then it is found that the Church of late had been ill governed; the Clergy-men grieved by many ways, the people otherwise handled than they ought to be, the Peace ill kept, the Laws less used, and Delinquents less punished than was meet; and in the sense of these inconveniencies were the Laws of *Westminster* the first made; wherein the world may see the great difference between the Prince and the King in one and the same man.

The most part of those Laws were little other than plaisters applied to particular botches of those times; wherein the King dealt with a tender hand, as if he feared to ulcerate any part, and especially the *Clergy*, and therefore delivered the last Law in a petitionary way to the *Clergy*, because it concerned the execution of Justice in prohibited times, and yet bound up all with a *salvo* to himself and his prerogative, like a wise King, that would neither lose right, nor do wrong; nor yet stickle to debate with his Subjects now, whenas his eye was upon a further mark. For *Leolin* *Walsinge* 46. the Prince of *Wales* had affronted him; and though he could not endure affronts, yet could he dissemble them for advantage; and so he suffered the Parliament to run its course, that he might have done the sooner. Otherwise he had a seed of his Father's conceit that Laws are not made for Kings, as appeared afterward: for after he had gotten his Army into the field, he took a *fifteenth* which was granted *M. Westm.* to his Father, and this was *inaudito more*: but there was no disputing with power, *An. 1276.* and therefore the Subject must be contented rather to score it up against the future, than require present pay: so dangerous a thing it is for *England*, that Kings should have occasion to gather Armies, though for never so honourable an employment.

The *Welsh* chase is hotly pursued, yet it did not rid much way; for it cost the *English* a voyage of nine years travel before they could attain the shore, although it had been often within their view. It may be the King found it advantageous for his Government, to maintain an Army in the field under the colour of the *Welsh*.

M. Westm.
Polyd. Virg.

Welsh War, that he might more bow his Subjects, to his own bent: for during these Wars, the King made many breathings, and took time to look to the husbanding of his own Revenue, as those Ordinances called *Extenta Manerii*, *Officium Corenatoris*, do witness, and the Statute of *Bigami*. But the people were not altogether yet tamed; for the times being still in Wars, and they occasioning much waste of Treasure, put the King to the utmost pitch of good Husbandry, and one degree beyond the same: so as under colour of seizing his own, he swept up also the Privileges and Liberties of his Subjects; some Authors reciting the complaints of the *Church-men*, others of the *Laity*: so as it seemeth the King was no respecter of persons, but his own. This, and others not unlike, had almost occasioned another Combustion, had not the meeting at *Gloucester* settled things for the present, by referring the right of *Franchises* to debate in the *Eyre*, and ordering re seizure of such Liberties into the Subjects hands, whereof they had been dispossessed by *Quo warranto*, and *Quo jure*, under colour of the fourth Chapter of the Statute of *Bigami*.

Nevertheless, however debonair the King seem'd to be, the sore between him and his Subjects was not fully cured; nor did the Lords trust him further than needs must: for whether they served in the Field, or met at Counsel, still they were arm'd; and during this daring of each other, were many profitable Laws made, whilst neither party durst venture bloodshed in touching too nigh upon the Privileges of each other, principally because the affairs in *Wales* were but laid asleep, and upon reviving, might turn the ballance to either side.

The Wars awake again, and therein are consumed nigh five years more of the King's Reign; so as whatever his intent was, he could have hitherto little opportunity to effect any thing for the advancement of the Prerogative of the Crown at home: Nor had he scarcely breathed himself and Army from the *Welsh Wars*, but he found both *France* and *Scotland* his Enemies at once. The King faced only the first, and fought the second; which held him work the remainder of his days: and at the same time also he arrayed both the Clergy and Laity at his own home, as if Providence had given him security for the good behaviour; and yet it failed him in the issue, and left him to the censure of the world, whether his Justice was spontaneous, or by necessity; for as yet he held the *Grand Charter* at parley, and therefore was rather eyed, than much trusted: Albeit he was put upon confidence in the Subjects discretion for aid of him in his continual undertakings: nor did they disclaim him herein, however chargeable it was; for all seem willing he should be employed any where, so as not within the *four Seas*.

Walsing. 69.

It is probable the King knew it, and therefore having made a Voyage into *France*, he changed the Scene of War, but to the other side as it were of a River, in hope his Lords would follow; but it would not be. This angered him, and he them: nor would his Clergy allow him any aid *Papa inconsulto*, and therefore he outs them from his protection. These and his irregular Preparations for War, by summons not only of his Knights, but all others that held Land worth 20 *l. per annum*, and Taxes imposed by an arbitrary way, increased Rancour into a kind of State-soul, little better than a Quarrel. For appeasing whereof, the King granted a consultation upon a prohibition, and unto both Clergy and Laity, a confirmation of the *Grand Charter* at the long run, and allowed it as the common Law of the Kingdom; and seconded the same with many succeeding confirmations, in the

the twenty seven and twenty eight years of his Reign, as if he had utterly renounced all thought of a contrary way. But the Statute in his 28th year had a sting in the tail that was as ill as his *saving of ancient aids and prisals*, which was in the Statute of confirmation of the Charters, though it were omitted in this Statute; for the saving was of such a sense as time and occasion would move the King's heart to make it: and thus this Statute became like a *Hocus Pocus*, a thing to still the people for the present, and serve the King's turn, that he might more freely intend the conquest of the *Scots*; which once done, he might, if he would, try masteries with *England*. But God would not have it so; the King in *Scotland* had power to take, but could not overtake; and the *Scots*, like birds of the prey, had wit enough to fly away, and courage enough to return upon advantage: and so the King was left to hunt the wind, which made him to return.

He might now expect the applause of his people for his good success, and the terrour of those that had stopped the broad way of his extravagant Prerogative; therefore looks big, rubs up old sores, and (having his Army yet in the field) sends for those Lords that would not follow him in his Wars in *Flanders*. All come and submit, and as it were in so many words let the King know that all *England* is now tame, and like to be ridden at his discretion. And now there's nothing in his way but the fatal execration, which he feared, not in relation to God's anger; but rather to the exasperated *Clergy*, and the dread of the Pope's direful Thunder-bolt. To avoid this storm, he procures a Dispensation from *Rome* to perjure and oppress without sin; a trick that he learned of his Father, and hid it within his breast, till now about two years before his end he brings it forth, to tell all the world that hitherto had been just against his will. But having obtained his purpose, he nevertheless misseth of his end; for a new King of *Scots* (our old good enemies) by divine providence suddenly crossed his way before him; and now it boots not to contend for arbitrary Rule in *England*, and lose the Crown of *Scotland*, which he once thought he had sure; he faces about therefore, and having spoken fair to his people, for *Scotland* he goes. Thus if all were not in a Parenthesis, the King intended a good period; but God only knows what his furthest reach would have been if he had returned, for he was taken out of this world in *Scotland*, and so left this his government somewhat like an imperfect sentence.

His Son *Edward* should have compleated it, but that he wanted his Father's sense, *Edward 22* and had too much of his Grandfather's superbient humour, that meeting with a stiff spirit, and a weak mind, brought sudden fire into the course of government, till it consumed itself in its own flame. For this King having newly slipped out of a Bondage of wise Government under his Father, ran the wild chase after rash desires, spending his former time in inordinate love, and his latter time upon revengeful anger, little inferior to rage; and so in his whole government was scarce his own man. His love was a precedent of a strange nature, that commanded him from all the contentments of his Kingdom to serve one man, a stranger, and a prostitute to all manner of licentiousness*, meerly for some personal endowments.* *Pious Govern-^{ment}* It shews that his judgment was weak, and his affections strong; and in that more weak, because he discovered it before he was crowned: like some of the weakest of the weaker Sex, the birth of whose minds are born as soon as they are conceived, and speak as soon as they are born. It is true, that the bravery of spirit may work after absoluteness in Kings, under the colour of some kind of wisdom. But it

it is one thing to rule without Law, and another to live without Rule: the one dashes against the Law of an *English* King, and may put on the Name of Policy, but the other destroys the Law of mankind, and can bear no better name than of brutish desire.

Edw. 2.

All the while *Gaveston* was in view, we find nothing concerning Commonwealth, or monument of Parliament, saving two Ordinances made by the King, and such Lords as suted to the King's way, rather than to his wants. The first was that *de militibus*, the other *de frangentibus prisonam*; for all the King's labour was to royalize *Gaveston* into as high a pitch as he could, and so to amaze his own eye-sight with contemplating the goodliness of his person. So as *Gaveston* is become the Image of the King, and presents his beams and influence into all parts of the Kingdom; and according to this Aspect they often change and wane, and yet at the best were but as in a misty night.

The *Barons* like not this condition of State-Idolatry; they were willing to adore the King, but they could not bow to an Image: they desired nothing more, than that their King might shine in his proper glory. Thrice is *Gaveston* banished, thrice he returns; the last occasioned another Civil War, wherein *Gaveston* lost his head. Thus the Lords removed the Eclipse, but (little the better thereby) they find it a vain labour to compel the Sun to shine by force, when it hath no light. Though *Gaveston* be gone, the mist of foreign Councils prevail; this was bred in the Blood, fed with Blood, and ended in Blood. Through the Glass of foreign Councils all things seem of foreign colour; the King to the People, and the People to him. The King at length begins to see himself undervalued, and that it began in himself; ventures himself into the Wars with *Scotland* to win honour; goes with much splendour, but returns with the greatest blot that ever *English* King suffered, confounded abroad, and slighted at home. For the bravest men, by ill success, are lost in common opinion; or, to speak in a higher strain, where God doth not bless, man will not. The King thus almost annihilated, catches hold of *Rome*, fawns on the Clergy, passes to them the Ordinances of *Articuli Cleri*, and *de prisfis bonis Cleri*: which lost the *Free-men* no Right, although it concluded the Crown. And to carefs the Commons, made the Statute *de Vicecomitibus*, and the City of *London* likewise by the Statute *de Gavaletto*. But God saw all sorts of men run at riot, and sends in upon the Nation, Plague, Famine, and other extraordinary Testimonies of his displeasure, even to the wonderment of other Nations; and this brought a kind of sobriety into Affairs, made all sorts tame, and for the present only prepared them for better times. For the King's time of longing again is come, and he must have new Play-fellows; finds the *Spencers*, or rather was found of them; they grow in honour almost beyond the reach of the Nobles, but not beyond their envy; and are more secure than *Gaveston* in this, that in their first sprouting the King's Council served himself and them to keep in with the Commons by making good Laws; such as the Statutes at *York*, of *Essoyns*, *Attaints of Jurors*, *Levyng of Fines*, and *Estreats* into the Exchequer, &c. all of them promising good Government. The *Barons* nevertheless liked not the *Spencers* greatness, and being by several occasions exasperated, join in one, and occasion a new War: The King, aided by the Commons (who yet thought better of the King than of the *Barons*, whom they saw prejudiced rather out of self-apprehensions, than the publick good) prevailed

vailed against the *Barons*, and made them the first precedent of death upon the Scaffold.

Now the *Spencers* are lords alone, thinking themselves above the reach of the once-formidable *Barons*, and the *Commons* too inferiour for their respect. Thus lifted up, they take a flight like that of *Icarus*. They had so much of the King's heart, as they could not spare any part thereof to the Queen; and she being as loth to spare as much for them as they had, retired with the Prince to a relief which they brought from beyond Sea, and with whom both Lords and Commons join. The favourites missing of their wonted wings, came down faster then they ascended; and together with them, the King himself, all of them irrecoverably. Thus favourites, instead of Cement between Prince and People, becoming rocks of offence, bring ruin sometimes to all, but always themselves.

The King foresaw the storm, and thought it safest first to cry truce with the people, and come to agreement with them by common consent, for the extent of his *Prerogative* in certain particular cases questionable; and this summed up, became a Statute for future times, to be a *ne plus ultra* between the King and the People. Prerog. Reg. 17 Edw. 2. Stat. de Homag. The like agreement likewise was concerning services of Tenants to their Lords; and an Oath framed to vindicate them from all encroachments. And something was done to calm the *Clergy* for the demolishing of the *Templar-Knights*; but the wound was incurable; words are not believed, if actions do not succeed; nor will Oaths now made, bind Kings, Bishops, Counsellors of State, Sheriffs, Mayors, Bailiffs, or Judges, to do justice; nor directions for regulating of Courts or Ordinances against false Moneys and Weights, nor all of them together, settle the people; but they adhere to the Queen, burning with jealousy against the King, and both herself and the Lords with rage against the *Spencers*. The King flies, and (being forsaken of the people, the Lords, the Clergy, his own Son, and the Wife of his own bosom, and of God himself) as the most absolute abject that ever swayed the Scepter, lost the same; and being made a monument of God's revenge upon inordinate desires in a King, and of the *English* people, being enraged, not long surviving his demise, he died a death meet to be for ever blotted out of the thoughts of all Subjects, but to be had in everlasting remembrance of all Kings. For if a Kingdom or Parliament misleads the King, at the worst he is but misled by his Council; but if he be drawn aside by Favourites, he must thank his own lust: in the one, he hath but the least share in the burden; in the other, he must bear the whole. Stat. Templar.

C H A P. LXV.

Of the condition of the Nobility of England, till the time of Edward the Third.

NOW was *Prerogative* mounted up to the highest pitch, or endeavoured so to be; either through the weakness or power of these Kings, of whom the first and last had little to ground upon but their own will; and the other, I mean *Edward* the first, had more wisdom and power, but was otherwise distracted by foreign and more urgent employments; so as the work fainted before it came to its full period. The contest was between the King and *Barons*, who till those days

M. Paris. An.
1227.

*First he was
Dux, and af-
terwards Rex.

days were rather the great and richer sort of men than *Peers*, although they were of the number. I am not so sharp-sighted as to reach the utmost intentions of the Lords; but their pretences are of such publick nature as it is plain, that if their private interest was wrapped up therein, they were inseparable: And I shall never quarrel the Lords aim at private respects, whenas it is plain, the publick was so importantly concerned; and yet I will not justify all that I find written concerning their Words and Actions. The speech of the E. of Cornwall to his elder Brother, and King Henry the Third, *I will neither render up my Castle, nor depart the Kingdom, but by the judgment of the Peers*; and of Simon the E. of Leicester to the same King, *that he lyed, and were he not a King, the Earl would make him repent his word*; and of the Lords, that *they would drive the King out of his Kingdom, and elect another*; and of the E. Marshal to Edward the first [bluntly swearing] that *he would neither go into Gascoigne, nor bang*; and such other, do favour of passions (especially that of the E. of Leicester and the Lords) and may seem harsh and unmannerly; and yet may admit of some allay, if the general rudeness of the times, the King's injurious provocations, and the passions of cholerick men, be weighed together. Yet will not all these trench upon the cause, nor render the state of the Lords too high, or disproportionable to their place in the policy of the Kingdom of *England*, as things then stood: I say, it was not disproportionable; for where the degree of a King was mounting up to such a pitch as to be above Law, the Lords exceeded not their places in pressing him with their Counsels and Invasions as might violate the Laws and Liberties, or hinder the current of Justice; concerning which I shall shortly state the case, and leave it to the censure of others. The Government of the people of this Nation in their original, was *Democratical* mixt with an *Aristocracy*, if any credit be to be given to that little light of History that is left unto us from those ancient times. Afterwards when they swarm'd from their hive in Foreign parts, and came over hither, they came in a warlike manner, under one conductor, whom they called a King*; whose power, whatever in the War, yet in time of peace was not of that height as to rule alone; I mean, that whereas the Lords formerly had the principal executory power of Laws settled in them, they never were absolutely divested of that power by the access of a King; nor was the King ever possessed of all that power, nor was it ever given to him; but the Lords did ever hold that power, the King concurring with them†; and in case the King would not concur, the people generally sided with the Lords, and so in conclusion the King suffered in the quarrel. From this ground did arise from time to time the wandrings of the people in electing and deposing their Kings during the *Saxon* times. Nor did, nor could the *Norman Williams* shake off this co-partnership, but were many times, as well as other ensuing Princes, persuaded against their own minds and plotted desires. Nor can it otherwise be supposed where counsels are settled; for whereto serve they, if (notwithstanding them) the King may go the way of his inordinate desire? If the Lords then did appear against these Kings whereof we treat, in cases where they appeared against the Laws and Liberties of the people; it was neither new, nor so heinous as it is noised, for them (who are equally, if not more entrusted with the Commonwealth than the King, by how much the

† Hence *Bracton's Habet Rex Superiores in Regno, i. e. Comitibus & Baronibus, &c. qui opponuntur Regi, ut si Rex sine eorum consensu, Franchum sibi imponerent, &c.* Vide post 199.

the Counsellors are trusted more than the Counsell'd) to be true, for the maintenance of their trust, in case the King should desert his. But the greater question is concerning the manner by Threats and War. It is as probable, I grant, that the Lords used the one as the other; for it was the common vice of the times to be rugged: yet if we shall add to what has been already said, first, that *Knight-service* was for the defence of the *Kingdom* principally; secondly, that the greatest power of *Knight-service* rested with the *Lords*, not only in propriety and ownership, but in point of direction for the benefit of the Commonwealth; and lastly, that the state of the times now, was such as the Kingdom was oppressed by *strangers Counsels*, and the *Counsels of the Kingdom* rejected; that instead of Law, Garrisons of strangers ruled; that no man could own his own; that the Subjects were looked upon as enemies; and of all this the King made the principal instrument, who had ruled and over-ruled in this manner, and so was resolved to continue: I shall leave it to the better judgment of others, what other healing plaister was to be had for such a sore. Albeit it cannot be denied, that more due respects might have been tendered to the kingly dignity than was in those times practised: And yet there was a difference also in the occasions of War; for certainly that last War with *Edward* the Second, was more fatal, and yet less warrantable; and in the issue declared that there was more of the Queen therein than of the Lords, who knew a way of removing favourites from the King, without removing the King from the Kingdom, or driving him out of the World. In all which nevertheless, it cannot be concluded that the Lords party was increased more than in the former Kings times; for the loss of the field in *Henry* the Third's time against the Prince kept them in awe all the succeeding Reign (although they were not then tongue-tyed) and their second loss against *Edward* the Second, which was yet more sharp, questionless quelled their spirits (although they lost no right thereby) and increased the King's party much by the access to the Crown of the services of such as held of those Lords that were attainted or disinherited: And yet by a hidden providence, the King was little the better when it came to the pinch. For when *Edward* the Second's Queen came from beyond the Seas, though with but a small force, all forsake the King; neither regarding the former terrour of the Army of a King, nor the right of service, nor Oath of Fealty, nor Promises, nor Laws, nor other Engagements; and so the King becomes a prey to an enraged Woman; or, which is worse, to a jealous Wife: So little can the name of a King do, when his person is despised; and so vain for him to trust in his *Militia*, that hath already disarmed himself of the hearts of his Subjects. The sum then of all the labours of the *Nobles* during these times will rest in this, that they won the day, and yet lost the field: although they lost their own bloods and estates, yet they saved all to the people; and left Laws in force, able to debate with *Prerogative* in the hand of any King that should succeed. Thus stood the matter in fact upon such grounds as it had, the validity whereof it is not my work to censure neither by the ballance of Law or Gospel, but leave it as a sore Time, that scarce will endure touch, nor bear a King further than he was good or brave.

C H A P. LXVI.

Of the State of the English Clergy until the time of Edward the Third: And herein concerning the Statute of Circumspecte agatis, Articuli Cleri; and of General Councils, and National Synods.

IT was a time of much action throughout the whole Christian State; and Rome now, having attained to its full glory, began to be eyed on all parts, as an irregular motion crossing all [publick] affairs, that it may like the sole Empress command all, and be controuled by none; and this wrought some stirrings in France, complainings in England, and facings between the Emperor and the Pope.

M. Paris. 720. How chargeable this was to the Pope's Treasury it is not material, but it occasioned, or was pretended to be the occasion, of all the intolerable exactions ensuing; there being scarce one year passed over without some extraordinary exaction levied upon the Church-men, either by *Provisors, Tenths, Procurations, Levies for the Holy War, Quindizms, Benevolences*, or other such like; and where money was not to be had, by levies of Ornaments, or of rich apparel, by *intimation, begging, persuading, commanding, threatening*; and in this course they continued till they had out-faced shame itself, and that the whole Law of Rome became comprehended in this one, *Quicquid libet licet*. - In general therefore the Church of Rome cannot be said to thrive during these extorting times, although Rome did; for if the *Laitie* were pillaged by the King, the *Clergy* much more both by Pope and King: if the one complained, the other cried: the one sometimes found relief from the King, but the other was helpless; for the Pope had no Ears to hear, nor the King Hands to help. He neither durst nor would cross the Pope, although the *Clergy* told him, that by these exactions they were impoverished in such a manner, as they were disabled to do him service for their Lay-fees. Thus Rome becomes a burthen to Rome, and the Members weary of bearing their Head. Hereafter must the Pope beware of falling out with Kings; for the *English Clergy* now, though late, see, that all is not Gold that glisters; nor is it any great privilege to be the *Pope's men*, further than the Pope will be a good Master, but this was not to be expected. Popes were grown so excellent, as they could not amend; and England so enamoured of them, as it is become their *verè hortus deliciarum*, as the Pope called it, when he saw the rich vestments of the *English Churchmen*; and therefore they must now be contented to be the Pope's viands as often as his hungry maw doth call, or otherwise they must fall out. An excellent posture of affairs, and brave preparative to dispose the hearts of all sorts for entertainment of the easy yoke of Christ's government, which was now at the door, and ready to be revealed! Nevertheless, poor and mean as the *Clergy* were, they had courage enough not only to stickle both with King and People for their own liberties, but also to invade the liberties both of *Crown and Commons*; having this advantage, that they had to do with a King and People that were two; and themselves well seconded by the Pope, that had no less power in those times of publick distraction, and was bound to serve the Cattle well that yielded him so much milk. The particular matters of

debate

debate may appear in their Paper of Grievances composed in Henry the third's time, and their Resolutions thereupon: their Complaints were renewed again in the Time of Edward the first (if we may give credit to *Baronius*) after the Statute of *Circumspecte agatis*. To the end therefore that the whole may lie before us, I shall set down the matter or substance of both these Papers severally, in regard they sound much alike; and note the difference: all which I shall do, to the end that it may more plainly appear what the *Churchmens* Idea was, and how far the common Law and King's Prerogative would agree thereto.

Vid. Addit.
Baronius An-
nal. 1306.

The Complaints are of this nature.

1. That the Church-possessions in their vacancies are wasted, and that Escheators do not only seize the personal Estate of the Abbot or Prior deceased, but such Corn in the Barn, and other Goods belonging to the houses, for their maintenance; as also the profits of Churches impropriate. 2.
- 3, & 4, & 5. Elections are either disturbed by the King's Letters preceding, or by delay of the Royal assent subsequent to the said Elections.
6. The Lay-power, without the advice of the Clergy, do put in, eject, or restore Incumbents to Benefices void.
7. Prelates are summoned to answer to the Lay-power, in the Writs Quare excommunicavit, and Quare non admisit.
8. Clerks are distrained in their Lay-fees, to answer before the Lay-power in Actions of Debts, Trespass, or other personal Actions; and in case they have no Lay-fees, the Ordinary is distrained by his Barony to cause the Clerk to appear.
9. The Laity are forbidden to take Oath, or to inform upon Oath before the Prelates, and to obey the Prelates commands in such cases.
10. Persons taken and imprisoned upon Excommunication, are ordinarily dismissed without satisfaction to the Prelate; and sometimes are not taken by the Sheriff, notwithstanding the King's Writ: And as well the King as his Officers do ordinarily communicate with such as are excommunicated, and likewise command others to communicate with them. 11.
12.
& 33.
13.
14. Clerks imprisoned for Felony are refused to be delivered to the Ordinary, unless upon security to appear before the Justices in Oyer; and sometimes are hanged before their Ordinary can demand them; and sometimes their heads are all shaven, that they may not appear to be Clerks. 15.
16. Justices itinerant do imprison Clerks defamed for Felony, or otherwise out-law them if they do not appear: And otherwise proceed against Clerks after their purgation before the Ordinary. 17.
18. The Lay-power seizes upon the Estates of Clerks degraded for Crimes.
19. Clergy are compelled to answer and give satisfaction for offences against the Forest-laws before the Lay-power: And in case of default, the Bishop by distress is compelled to order satisfaction, as well in such cases, as in personal Actions. 20.
21.
22. Privileges of Sanctuary are invaded by force.
23. Executors of Bishops are hindered from administering the Estate without Licence first obtained from the King.
24. The King's Tenants Goods are seized after their decease by the King's Bayliffs.
25. Intestates Goods are seized by their Lords, and their Ordinary hindered from Administration.
26. The

26. The King's prohibition passeth in case of Tythes and Chappels.

27. The like in cases of Troth-plight, Perjury, Oerage, Herlet, or other Church-duties, as money for reparations of Churches, and fences in Church-yards, pecuniary punishment for Adultery, and costs of suit in Ecclesiastical Courts, Sacrilege, Excommunication for breach of the Liberties of the Church, contrary to the Grand Charter.

28.
40.
29.
30. In cases of prohibition, if the Ecclesiastical Judge proceed contrary to the same, he is attached, and compelled to shew his Acts in Court; if the Lay-Judge determine the cause to be Temporal, the Ecclesiastical Judge is amerced; if he proceed against the prohibition, and it is tryed by Witnesses of two ribaulds: and in case it be found for the Ecclesiastical Judge's cognizance, yet there is no costs allowed for such vexation.

31. 32. That Jews in matters Ecclesiastical aforesaid, are by the King's prohibition drawn from the Ecclesiastical Judge unto the Lay-Magistrate.

33.
34. Question about Lands given in Frankalmoin, are tryed in the Lay-Courts; and by reason of such Tenure, the Owners, though Clergy-men, are compelled to do suit at the Lay-Courts, and are charged with impositions, and are distrained hereunto, although the Lord have other Land of the Donor in Frankalmoin subject to his distress.

35.
36.
37.
38. 39. Prelates summoned to higher Courts, are not allowed to make Attorneys to appear for them in the inferiour civil Courts.

40. 41. Grantees of Murage, or other unwonted impositions, compel the Church-men to pay the same.

42, & 43. The Clergy are charged with Quarter, Cart-service, and purveying.

44. The Chancery sendeth out new Writs contrary to the Liberties of the Church, and the Law of the Land, without the assent of the Council of the Kingdom, Princes and Prelates.

45. The King doth compel the Clergy to Benevolences to the King at his Voyage into foreign parts.

46. Amercements granted to Clergy-men, are turned into Fines by the Justices, and by them taken.

47. Clergy-men are fined for want of appearance before the Justices itinerant, and of the Forest, upon common summons.

48. Quo warrantos granted against the Clergy for their Liberties, and the same seized, unless they be set down in expresse words in their Charter, notwithstanding that by long custom they have enjoyed the same, and many times contrary to expresse grant.

49.
50. This is the sum of their Paper Grievances; and because they found the King either wilful or unconstant, they resolve upon a Remedy of their own, by Excommunication and Interdiction, not sparing the persons of any principal or accessory, nor their Lands, no not of the King himself: and for this they join all as one man. Now what scare this made, I know not, but Henry the third in the Stat. of Marl. and Edward the first in his Stat. at Westminster, and other Statutes: the first spake fair, and seemed to redress some of these complaints: as also did Edward the second; and yet the Common Law lost little ground thereby.

That which Henry the third did, besides his promises of reforming, was done in the Stat. of Marlbridge, c. 29.

Marl. c. 29. The successors of Abbots, Priors, and Prelates, &c. shall have an Action of Trespass for Trespases done nigh before the death of their Pre-

Predecessors, upon the Estates of their Corporations. And shall prosecute an Action begun by their Predecessors. And also shall have an assize against intruders into any of the Possessions belonging to the said Corporations whereof their Predecessors died seized.

This might seem a remedy provided against the first Malady complained of, and questionless bound all but the King; and so might perchance abate somewhat the edge of that Article. But it being the Clergy's reach to grow rich, and the Pope's cunning to help on that Work, that they might be as stores for supply of his Treasury; and had forbidden Abbots and other Prelates, &c. the liberty of disposing their Estates by *last Will*: Kings therefore, as supreme Patrons to these bodies in their vacancies, used to seize all the Estates of the Prelates, with the Temporalities, to their own use, as well to preserve the Riches of the Kingdom to it self, and the possessions of such Corporations from spoil, as to be a cloke of their own covetousness. And under the Estates of the Prelates, or Heads of these Corporations, all the Goods and Chattles belonging to the said Corporations were comprehended, in regard that all was by Law adjudged to be in the sole possession of *Fits. Abbe.* such a Head, and without whom all the rest were accounted but as *dead persons.* ^{25.}

No Clergy-man is bound to attend at the Sberiff's Turn.

Ma. br. c. 10.

William the Conqueror first exempted the persons of the Clergy from attendance upon Temporal Courts; yet they were still urged thereto, and especially by a Law in Henry the first's time; but by this Law they are discharged, and in some measure a provision made against the grievance in the 39th Article before-mentioned. ^{Gloss. p. 428. Ll. Hen. 1. c. 31.} These amends we find made to the Clergy by Henry the third, besides his confirming the *Grand Charter*: And his Son Edward the first pursued the same course, especially in his first times, when he was but tenderly rooted; as may appear in the Statute of *West.* 1.

Clergy-men nor their Houses shall be charged with Quarter, nor their Goods with Purveyance or Cart-Service, under peril of imprisonment, and damages by action or imprisonment. ^{West. 1. c. 1.}

The great endowments of Lands, Rents, and Revenues given to the Churchmen by the Laity, was for the maintenance of *Hospitality*, and works of *Charity*. The Founders and Benefactors hereby obtained a right of *Corody* or Entertainment at such places, in nature of *Free-quarter*; which in the necessitous times of Henry the third, became so common, that every one that had power never questioned right, and the King above all the rest. By means whereof, the Church-revenues were exceedingly wasted: for remedy whereof, all Offenders are by this Statute made liable to fine and imprisonment, and double damages in case of Action of *Trespas*; the King only excepted, against whom they had no defence, but would rather have won him to have been their defence against the exactions from *Rome* that continually plagued them.

A Clerk taken upon Felony, being demanded, shall be delivered to the Ordinary; but being indicted, shall not be dismissed by the Ordinary without due purgation. ^{West. 1. c. 1.}

Co. 2. instit.
164.
S. amf. 130.

M. Paris ad-
dit. fol. 200,
206, 207.

Briton. 4.
f. 11.
Bracton, lib.
3. fol. 123.

With due respects to the Judgment of those grave and honourable persons of the Law, it seemeth to me that before the making thereof, the use was, that if a Clerk was defamed, or appealed by an Offender for Felony, before Conviction, he was forthwith imprisoned. Nor could he be delivered unto the Ordinary upon demand before *Inquest* taken, unless upon sufficient Security to endure the Tryal before the Judges *itinerant*; which thing was not easy to be had for a Clerk, as times then were. This Law therefore was made in favour of the Clergy, who required that such as were *Clerici noti & honesti*, should forthwith upon their apprehending be sent unto their Ordinary; and those which were *vagi & incogniti*, should upon demand be delivered to be judged by their Ordinary freely, and *non expectatis Justiciariis quibuscunque*. Such wandering Clerks therefore the Clergy will have delivered before *Inquisition*, if demand be made. Nevertheless, because the Indictment passed many times before the Demand came; for by the fifteenth Article of the Clergy's Complaints foregoing, it appears that the Lay-Judge made more than ordinary speed, for fear of stop: This Law provided that such also should be delivered to their Ordinary, and that due *purgation* should pass before the party were delivered; and in case the Ordinary neglected his duty herein, he was liable to a Fine or Amercement. Thus is Briton to be understood in this point; whereas Bracton speaking of such as are convicted, affirmeth, That if demand be made of such as are not indicted (for of such he speaketh) they ought to be delivered without Indictment: I suppose he meaneth by the Church-Law; for till this Statute the Temporal Judges practice was otherwise, as appeareth by the fourteenth Article of the Clergy's Complaint foregoing; and so by this Law, the fourteenth and fifteenth Articles of the Clergy's Complaint are answered.

Disturbers of the Freedom of Elections fined.

West. 1. c. 5.

With submission to the judgment of others, I suppose that this was framed principally for the Satisfaction of the Clergy's Complaints in the third, fourth, and fifth Articles foregoing: and I am the rather induced hereto, because as touching Elections in Temporal places of Government, several Laws are especially framed; such as are Elections of Sheriffs and Coroners, whereof the one is West. 1. cap. 10. the other Artic. Super. Cart. cap. 10. And no Law is especially made as touching the Elections of the Clergy, if not this.

West. 2. c. 19.

Ordinaries having the Goods of the Intestate, shall answer his Debts.

Originally the Goods of the Intestate passeth by a kind of descent to the Children: afterward by a Saxon Law, the Wife had her part; and this continued all the Normans time. But now the strength of the Canon-Law growing to its full pitch, after a long chase attached the prey. In Henry the first's time they had gotten a taste; for although the Wife and Children, or next of kin, had then the possession, yet it was for the good of the Soul of the deceased; and the Ordinary had a directing power therein, and so was in the nature of an overseer, and somewhat more. Afterwards in the time of King John, the Clergy had drawn blood: for though the possession was as formerly, yet the dividend must be made in the view of the Church; and by this means the dividers were but meer instruments, and the

the right was vanished into the Clouds, or, as the Lawyers term it, in *Abeyance*. But in *Henry* the third's time, the Clergy had not only gotten the game, but gorged it: Both *Right* and *Possession* was now become theirs, and wrong done to none but the Clouds. This was not well digested before *Edward* the first recovered part of the morsel, and by this Law declared the use to be for the benefit of the deceased. And thus the one was satisfied in having what he used not, the other, in using what he had not.

But these are but gleanings; the Law of *Circumspecte agatis* brings in a load at once: For the Clergy being vexed with the passing of the Statute of *Mortmain* (whereof hereafter when we come to speak of the Clergy's losses) they make grievous complaints of wrongs done to their privileges. And after six years the King is at length won, and passed a writing somewhat like a grant of Liberties, which before-times were in controversy: and this *Grant*, if it may be so called, hath by continuance usurped the name of a *Statute*; but in its own nature is no other than a *Writ* directed to the Judges, in substance as followeth:

Take good heed that you do not punish the Bishop of Norwich and his Clergy, if they hold plea in Court-Christian of things merely spiritual: for in such cases the Ecclesiastical Judge hath cognizance, notwithstanding the King's prohibition.

It is therefore neither *Grant* or *Release*; but as it were a *Covenant* that the Clergy shall hold peaceable possession of what they had, upon this ground, that the King's prohibition hath no place in such as are merely spiritual. So as hereby the Clergy got a Judgment against the Crown by confession, and an *Estoppel*, upon this maxim, that *spiritual things belong to spiritual men*, into which rank the King's person cannot come: thus thought they; but what are *spiritual* causes; and why so called? are they such as concern *spiritual* persons and things? this was the old way: mark; but if we bring into this Category, *Adultery*, *Fornication*, *Incest*, &c. we shall mar all. *Linwood* tells us, that mere *spiritualia* are such as are *sine mixtura temporalium*: there may be somewhat in this, though I cannot find it; nor can I make out the sense of the term any other way, but to limit it to such things which by common custom the Ecclesiastical Judge had cognizance of: for otherwise neither King nor Law ever intended it to be expounded by the *Canon*, nor was it the intent of this *Writ*, *Law*, or *Licence* (call it what you will) thus to conclude, as the particulars following will manifest.

Fornication, Adultery, and such-like, punished sometimes upon the body, and sometimes upon the purse.*

These crimes the Saxons punished by the *Temporal* power, as I have already shewed. The Normans continued this course, if we may believe the Conqueror's Laws, which gave the fine in such cases to the Lord of the Delinquent. And it is confessed, that *Henry* the first and the second continued it; as the Clergy's own complaint, just or unjust, doth witness. And what course was holden in the time of King *Steven* and *John*, is to me unknown; nor is it much to be regarded, seeing the latter did he cared not what, and the former to gain the good-will of the Clergy regarded not what he did. The custom therefore cannot be made

*This was originally presentable and punishable in the *Leet*.

Ll. Gulielm. c. 14, 19, 371.

M. Paris addit. fol. 201. art. 28.

Circumspecte
agatis.

good for the *Clergy*, much less to punish the bodies of *Freemen* in such cases, it being contrary to the *Grand Charter*; never asked by the *Clergy*, formerly, nor no complaint before now for denial: for my part therefore I shall not apprehend it of a higher nature than the King's Writ, which in those days went forth at random, if the 44th Article of the *Clergy's* complaints foregoing be true: It being so contrary to the common sense of Parliament to give the Bodies of the *Freemen* to the will of the *Clergy*, to whom they would not submit their *Free-holds*. But the Writ proceeds in enumeration of particulars.

Reparations and adornings of Churches, and Fences of Church-yards. Violence done to a Clerk, Defamation to reform, not to give damage. Perjury, oblations, payments of Tythes between Rector and Parishioner. Right of Tythes between two Rectors to a fourth part of the value. Mortuaries due by custom. A Pension from a Rector to a Prelate or Advocate.

The most of which were under the power of a prohibition in the time of Henry the third, who was King but yesterday, as the Articles of complaint formerly set down do manifest. Nor had the *Clergy* ever better Title than connivance of some such favourites as King Steven, whose Acts may, peradventure, be urged against Kings, but not against the people, unless their own act can be produced to warrant them. The learning, in the *Princes case*, will (I suppose) admit of a difference: for it can never be made out, that the King's Council in Parliament was the * *Magnum Concilium Regni*, but only the *House of Lords*; and therefore whatever passed in Parliament by their only advice might bind the King, but could never reach the *Commons* nor their Liberties. And thus the *Grand Charter* in the first conception was conclusive to the King, but was not the act of the Parliament; because the Parliament cannot grant a Charter to itself of that which was originally custom. And therefore this Law, however countenanced, can never be concluded to be other than a *Permission*; not only because it was never the Act of the *Commons of England*, but because it is contrary to the liberty of the *Freemen*. And it is beyond all imagination, that the *Commons* should out themselves from the protection of the *Common-Law*, and yoke themselves, their *Free-holds*, and *Estates*, under the bondage of the *Canons*; nor ought such a construction to be admitted, without express words to warrant it. As for the conclusion, it is worse, and not only dishonourable to the King in binding his Arms from protecting his Subjects by the Common Laws, and so in some respects making them *Outlaws*; but dishonourable to itself, whilst it makes *Prohibitions* grounded upon Laws to be nullities, by a late trick of *non obstante*, which was first taken up by the Pope, then by Henry the third, and by this King granted to the *Clergy*: and thus are all set at liberty from any rule but of that *Licentiousness*. Nevertheless, this Law did thrive accordingly; for we find scarce any foot-steps in story of any regard had thereof till it became grey-headed. For it was not long ere the King stood in need of money, and was necessitated to try the good wills of the *Clergy* more than once: this occasioned them to be slow in answer, and in conclusion to deny that they should aid the King with any more money, *Papa inconsulto*. The King hereupon disavows the

Coke lib. 8.

* This *Magnum Concilium* was the ordinary Annual Parliament, in time of the Saxons. But in *arduis Negotiis Regni*, where the *Commons* were to be charged, they were always summoned. vide *Lex Parl.*

Antiq. Brit. vit. Winchel. &c.

the Clergy, and leaves them to the *Romish* oppressions, which were many; and then the Clergy rub up all old sores, and exhibit their complaints to their holy Father, to this effect:

1. That the King's Justices intermeddle in Testamentary causes, accounts of Executors, and cognizance of Tythes, especially to the fourth part of the Living. Baronius Annal. an. 1306.
2. That the Clergy were charged to the King's Carriages. That the King's Mills were discharged from paying of Tythes. The Clerks attending on the Exchequer, were necessitated to non-residency. And that after their decease, their Goods were seized till their accounts were made. That Ecclesiastical possessions were wasted during vacancies.
3. That Clerks were admitted to free Chapels by Lay-men.
4. That the King's Justices took cognizance of Usury, Defamation, violence done to Clerks, Sacrilege, Oblations, Fences of the Church-yards and Mortuaries.
5. That Prohibitions are granted without surmise.
6. That Clerks are called to answer in the King's Court for crimes, and being acquitted, the Informers escape without penalty.
7. That Clerks are not allowed their Clergy.
8. That after purgation made, Clerks are questioned in the King's Court for the same offence.
9. That persons in Sanctuary are therein besieged.
10. That the Writ de Cautione admittenda issueth forth, although the Church be not satisfied; and excommunicate persons being imprisoned, are enlarged in like manner.
11. That Debts between Clerks due, are determined in the temporal Courts.
12. That Bishops are compelled by Distress to cause Clerks to appear in Lay-courts without cause.
13. That the Church loseth its right by the ceasing of Rent or Pension by the space of two years.
14. That Nuns are compelled to sue in the Lay-courts for their right in possessions befalling by decease of their Kindred.
15. That Churches are deprived of their Privileges till they shew Quo Warranto they hold them.
16. That Ecclesiastical Judges are stopped in their proceedings by Sheriffs and Great Men.
17. That Bishops refusal of Clerks presented are examined in the Lay-courts.
18. That Patrons of Religious Houses do oppress them by extream Quarter.
19. That Bigamy and Bastardy are tried in Lay-courts.
20. That the King suffers his Livings to be vacant for many years.
21. That the Clergy are wronged by the Statute of Mortmain.

Here's all, and more than all that's true; and more than enough, to let the Reader see that the Writ *Circumspecte agatis* was but a face put on for the present, after laid aside, and the Clergy left to the bare Canon. They likewise shew what the Clergy aim'd at: and in that they did not obtain, it was to be attributed to the resolution of the *Laity*, and not any neglect in themselves, for the Arch-bishop died in the service; and it is thought that grief for these matters was no little cause thereof. But the times within a while grew troublesome, and the King in pursuit of the French Wars, being unadvised in his way, angered the people by his arbitrary

Stat. de con-
sultat. 14.E.1. arbitrary levy of Men and Money, as it brought forth a *State-scul*, little inferior to a Quarrel. And to pacify the *Clergy*, he granted them the Writ *de consultatione habenda* in all *matrimonial* and *testamentary* cases, which were of their least doubted privileges; and this qualified the first Article of complaint next foregoing, if such cause they had of complaint; and this was all that the *Clergy* got at *Edward* the first's hands. *Edward* the second was a man that was neither well-affected to *Rome*, nor weak in spirit; and yet so unhappy, that his way neither promised good success, nor never had it; and so he became a Servant unto the humours of his Servants, to keep his head above water; but especially after he was chased by the *Scots*, and quite out of breath, he calls for help of all, but first of the *Clergy*, and bespeaks them with the Ordinance of *Articuli Cleri*; wherein he gives some satisfaction to the complaints formerly mentioned, which it seems by *Baronius*, were exhibited in Parliament.

cap. 1. *Ecclesiastical Cognizance extendeth unto Tythes, Oblations, and Mortuaries, and to pecuniary recompence.*

LI. Alfred. c. 9.
LI. Edw. c. 9.
LI. Canut. c. 8. In the first times, neglect or denial of *Church-duties* was punished in the King's Court by *Fine*. Afterwards the Bishop was joined in that Work, and the *Tytable Goods* were seized; either parts whereof were taken to the Lords and the Bishops use by moyeties, a ninth part left to the Owner, and the tenth to the Church. Nor had the Bishops any peculiar Courts of cognizance of causes, till the times of the *Normans*; nor as yet in those times had they power to all intents: For though it be true, that the *Roman* Tribute of *Peter-pence* was allowed by the Conqueror's Law to the Bishops Court, yet we find no Law for *Tythes* and other profits to be recovered by the *Ecclesiastical Court*, till about the end of *Henry* the second's Reign, or King *Steven*'s time. For at a Council at *London* in *Henry* the second's time, it was ordained, that three Summons in the Pope's name should be made to such as payed not their *Tythes*; and in case they then refused, they should be *Anathema*. And after that time in a Council at *Oxford* under *Steven* Archbishop of *Canterbury*, it was decreed that the *Laity* should be entreated first to pay their *Tythes*, and then if necessity require, that they should be compelled by *Ecclesiastical Censure*. So as their power crept up by degrees in recovering of *Church-duties*, as it did in *Testamentary* matters; and at length *Henry* the third, worn and spent with the *Barons Wars*, about his latter end yielded to *Boniface* the Archbishop his importunate demands; and first gave liberty to the *Clergy* to be their own Judges: and yet the Lay-Judges, although divers of them were *Clergy-men*, did not suddenly forbear, till this Law came, which gave some satisfaction to the first and fourth Articles of Complaint foregoing.

LI. Gul. 20.
c. Spicileg.
180. Binius, Tom.
7. fol. 661.
An. 1173. *Articuli Cleri.*
Baronius, Annal. 1222.
cap. 19.

cap. 2. *Ecclesiastical Cognizance extendeth not to a fourth part of the Tythes of any Living, nor to pecuniary Mulcts for sin, saving by way of commutation.*

The Complaint of the *Clergy* in *Henry* the third's time, was against the King's prohibition in case of *Tythes* indefinitely: for in those times, and afterwards in *Edward*

Edward the first's time, the King's Court had the cognizance of all *Tytbes*; and therefore in the Statute of *West. 2. c. 5.* the Writ of *Indicavit* was allowed in case of right of any portion of *Tytbes*; yet the Church still gained ground, and about, or before the death of Edward the first, the Temporal Judge had yielded unto the Clergy the cognizance of a portion of *Tytbes* under the value of the fourth part: Artic. 1. for in the Article next foregoing, the Clergy's complaint was, *that the King's Justices held cognizance of the fourth part*; and here they were confined thereto by this Law, which the Clergy could never remove.

For violence done to Clerks the offender shall render damage in the King's Court; but Excommunication, Penance, and Commutation shall be in the Bishop's Court. cap. 3.

The Canon-Law had an antient claim to the protection of Clerks, both as touching their persons and estates; and prevailed so far, as they were thereby emboldened to offer violence unto others. But as I formerly shewed, by a Law in Henry the Second's time, the Temporal Judge resumed his original Power; and this became a fore evil between the Clergy and Laity: for though it were allowed that Clerks should not be sued but before the Ecclesiastical Judge in such cases, yet it was no Warrant for the Laity likewise to be called before the Ecclesiastical Judge in such cases; and therefore the Clergy's complaints shew that the Matter was doubtful, and that the Lay-judge generally maintained his Jurisdiction, although sometimes he disclaimed it; as it may appear in the case of a Trespass in the nature of a riot committed upon the Priory of *St. John of Jerusalem*, in the seventh year of Henry the Third, whenas it was adjudged *per Curiam*, that it belonged to the Ecclesiastical Court to punish. But in Edward the First's time, by the Ordinance of *Circumspecte agatis*, and Articles concerning Prohibitions, the difference was made between damages, and *pro reformatione*, and the same affirmed by this Law; and so the matter settled, and the fourth Article of the Clergy's complaint in some measure was satisfied. Fitz-Herb. 7 Hen. 3. prohibition 30.

Defamation within cognizance of the Ecclesiastical Court, and corporal Penance therefore, and Commutation. cap. 4.

The words are general and peremptory, with a *non obstante* the King's prohibition; and yet the Law afterwards restrained the sense to *defamation* for crimes, or offences triable in the Ecclesiastical Court: and this gave further satisfaction to the fourth Article of the Clergy's complaint foregoing.

Tytbes of new Mills may be recovered in the Ecclesiastical Courts. cap. 5.

This *Tytbe* of Mills was a new encroached *Tytbe* never mentioned in any former Law of this Kingdom, nor demanded by the Synod at London, Anno 1173. which mentions *Fruit-Trees*, young Broods of living creatures that are tame, *Herbage*, *Butter*, *Cheese*, with other particulars, but mentions not new Mills. It is true, that antiently Mills paid *Tytbes*; but such they were, which were antient, and had paid the same by custom; and such as by Law in the Confessor's time were declared to be given a *Rege*, *Baronibus*, & *populo*. But by the second Article of Bineus Tom. 7. 661. Ll. E. c. 8. 2.

of the Clergy's complaint next foregoing, it appears that the *King's Mills* refused to pay this *Tythe*: now whether the *new Mills* were called the *King's Mills*, as being made upon the publick streams by the King's licence; or whether the *Mills* newly made within the Demesnes of the Crown, it is not to be insisted upon; but it is evident, that till this Law was made, the *new Mills* would not *Tythe* their Labours.

cap. 6.

One of the same matter may be tryed at the Common-Law, after Sentence in the Spiritual Court, in divers respects.

The great sore that was complained of, was, that the Clergy after *purgation* in the Ecclesiastical Court made, were proceeded against in the King's Court in case of *breach of Peace* or *Felony*, as may appear out of the 16th Article of the Clergy's first Complaints, and the 8th Article of that taken out of *Baronius*. Nevertheless the present Law subjoins an example of the questioning a *Lay-man* in the Ecclesiastical Court, in case of violence done to a *Clerk*, as a matter which may be tryed in the Ecclesiastical Court, and yet reviewed by the King's Court.

cap. 7.

The Writ de Excommunicato deliberando shall not issue forth, but upon evident breach of the King's Liberty.

This might be intended in satisfaction of the Tenth Article of the Clergy's complaint in *Baronius*, and the Tenth Article in the Clergy's complaint first recited; although that complaint both in the 10, 11, 12, and 33 Articles, seem to be but clamour upon Officers, and not the King's Court of Justice.

cap. 8.

Clerks Officers to the Exchequer are to be corrected by their Ordinaries; and yet not tyed to residence during their attendance on the Exchequer.

This is in part an answer to the second Article of the Clergy's last complaint, and a justification thereof, as a thing that is *pro bono publico*.

cap. 9.

Clergy-mens Goods shall not be distrained either in the High-way, or Sanctuary-grounds, unless such as have been of late purchase.

The complaint exhibited in *Henry* the third's time, and the 8th Article, was only in ordinary personal Actions; but in the complaint made in *Edward* the second's time, Article 12. is, that it is without cause that they are so distrained. This Law yieldeth them somewhat, *viz.* immunity from Distress within their ancient possessions, which had been by antient custom privileged; but yields nothing as touching their latter purchased lands, because they had no such custom.

cap. 10.

High-ways and Sanctuaries shall be free for such as abjure, so as they shall neither be distrained from liberty, nor necessities kept from them. Felons may make free confession to the Priest without danger.

The

The Grievance in the 22d Article of the Clergy's complaint in *Henry the Third's* time, and the ninth in that of the times of *Edw. 2.* are hereby relieved; provided that the Delinquent keeps himself in due order.

Houses of Religion shall not be oppressed with Corodies, Pensions, or cap. 11.
Entertainments of great men.

This answered the grievance in the 42. and 43. of the first complaint, and the 18th of the latter, and in effect was little other than what was formerly settled by *West. 1. cap. 1.*

The King's Tenants may be cited before the Ordinary out of their cap. 12.
own Town; and if Excommunicated for want of appearance, the Writ
de Excommunicato Capiendo, shall be awarded.

A remedy this was against the grievances in the 12th and 33 Articles of the first complaint, and in the 10th Article of the last schedule of complaints. And thus the Clergy have gotten the day of the *King's Tenants*, which they had been striving for ever since the *Conquest*, as may appear by what hath been formerly said; and now the *King's Tenants* are in no better condition than *other men*, viz. they may now be excommunicated without the King's licence: nor is the answer *Nunquam fuit negatum* to be referred to the point of Excommunication; for that power was denied them but unto the citing them out of their own Parish, which cannot be found to be denied to the Clergy, by any thing that yet appeareth.

A Clerk presented and found unable by the Ordinary, shall be tryed cap. 13.
again by the Ecclesiastical, and not the Lay-Judge.

Although the fitness or sufficiency of the party presented, is to be examined by the Ordinary, yet the *Civil Magistrate* hath power in action brought to enquire and determine whether the Ordinary's work was rightly done; and so the 17th Article of the last complaint answered.

Elections shall be free.

cap. 14.

The Law was of the same with this in the *Stat. W. 1. cap. 5.* which see before; and it may be that the iniquity of the times continued notwithstanding, and so occasioned the renewing of this Law.

A Clerk having taken Sanctuary shall not be compelled to abjure. cap. 15.

Nor after confession of the Crime, or appealing others before the cap. 16.
secular Judge, shall be denied his Clergy.

Although the temporal Courts proceeded not so far as to pass sentence against a Clerk that had taken Sanctuary; yet they proceeded to enquiry, as may appear by what was said formerly concerning the *Stat. W. 1. cap. 2.* and therefore
though

7 E. 2.
Fitz. tit. for-
feiture 34.

though this Law in the 15th Chap. alloweth that a Clerk in Sanctuary shall enjoy his Ecclesiastical Liberty, yet the words *legi Regni se reddens* are interposed; and the reason is, because the King upon Indictment found, had right to the Delinquent's goods, and profits of his Lands, until due *purgation*; and then his Lands were by a Writ out of the Chancery to be restored to him again: nor could any *purgation* regularly pass before the party was indicted.

Stat. de asport.
relig. 35. E. 1.

No Religious House shall be charged with Tax to any Superiour without the Realm of England; nor shall send to any Visitation out of England.

This was neither at the request of the Clergy, nor act of kindness intended unto them; but for the good of the Kingdom, to prevent the bleeding of the Treasure of the Kingdom into Foreign parts.

Mag. Charta
cap. 35.

Patrons of Abbeyes shall have their custody during their vacancies.

This was the antient Law, now revived by the Clergy's consent, and intended for the safeguard of the Revenues of the Houses, and their maintenance; and therefore it is with a *sicut superius dictum est*, cap. 5.

Stat. de pris
Edw. 2.

The Goods of the Clergy freed from purveyance, unless they will.

It was a favour given by Edw. 2. to the Clergy, to gain their good-will after the death of Gaveston, the shameful defeat received in Scotland, and some particular testimonies of God's displeasure, whereof he began to be somewhat sensible.

Stat. de Quo
Warranto.
18 Edw. 1.

Franchises bolden by Prescription or Charter confirmed, and Tryals by Quo Warranto allowed to be in Eyre.

It was the common share of the great men, but especially of the Clergy, to have their *Franchises* exposed to the Prey of the Eagles, or to such as hawked for them; and it is likely the King had not so easily forgone his prize, if all the fat had fall'n to his own share: but perceiving that more benefit came to his instruments than was meet, and himself little the better thereby; he sacrificed his Judges to the people, but it was to his own behoof, and so gained both credit and favour from the people, and profit to himself; and in some measure satisfied the 48, 49, 50. Articles of the Clergy's complaint in the time of Henry the Third, and the 15th Article of their last complaint.

Mag. Charta
cap. 37.

Lands or Tenements aliened to a Religious House shall escheat to the Lord, if the Alienor take the same back to hold of that House.

The ground hereof principally was the prejudice done to the Lord by destruction of the Tenure, albeit that it had been an antient grievance complained of in the Saxon times, That the Clergy were covetous, and swallowed

lowed down Estates, and thereby weakened the Kingdom. But now they are become even cheaters, serving the turns of treacherous Tenants, that would give their Lands by compact with the Church-men, to receive them again from them to hold of the Church; which was a liberty that men thirsted after in those times, wherein the Church-men were more adored than their Images. It seems this Law was made after *Bracton's* time, if that be true in the *second Institutes*: for he saith that a man may give his Lands to any one, whether Christian or Jew, or religious person, and nothing shall hinder it but the special reservation of the Donor; and yet he saith that such gift or grant taketh not away the right of the Lord Paramount in his Tenure, albeit the gift be in *free Alms*. Nevertheless it seemeth to be such restraint, that the *Templars* and *Hospitallers* were fain to find out a new way, which was to protect mens Tenements from execution of Law by levying [erecting] crosses thereon, albeit the right of the Lords was not barred; and therefore *Edw. 1.* provided a Law to make this also in nature of a *Mortmain* within the Statute made in the seventh year of his Reign, called the Statute *de Religiosis*; by which it was enacted, that in case of such alienations in *Mortmain*, the Lord should have liberty to enter; if he failed, then the Lord Paramount; or if he failed, the King should enter, and dispose of the same; and that no licence of *Mortmain* should be sued out, but by the mean Lord's assent; and where part of the premises remain still in the Donor, and the original Writ mentioneth all the particulars. And thus at length was this issue for the present stayed, which hitherto wasted the strength of the Kingdom; and by continual current emptying it into the *mare mortuum* of the Clergy, consumed the maintenance of *Knight-service*, by converting the same to *Clerk-service*; [which notoriously enervated the sinews of Government and the strength of the Kingdom.]

Bracton, l. 1. fol. 13.
Coke 2. Instit. super Magna charta, c. 36.
p. 74. & 75.
Bracton, l. 2. c. 10. fo. 27.

Stat. West. 3. c. 33.

Stat. de Religiosis. 7 E. 1.

Stat. de A-mortizandis terris. M. West. An. 1280. Mag. Charta cap. 39.

No Judge shall compel a Free-man to make Oath without the King's command.

So is the sense of the Law rendred by an ancient Author; and I hope I shall not wrong the Text, if I affirm, that the Ecclesiastical Judge was included within the equity, though properly he be not *Balivus*; for the Law intends to shew that it is a liberty that the Subject hath, not to be compelled to take Oath without the King's especial command; and by consequence it sheweth also, that the King at that time, and until then, had the directory of Oaths; for it was an ancient Liberty given in the King's Charters unto such as they pleased, viz. to impose Oaths, and to punish for breach of Oath; and this passed under the word *Athæ* or *Athas*; and so *Edmund* the Saxon King gave to the Abbey of *Glastenbury* amongst other *Athas* & *Ordulas*; and the Church-men that first procured vacations from Suits of Law during holy times, procured a Law also to be settled by *Edward* the Saxon King, and *Gunthurne* the Dane, that *Ordeal* and *Oaths* should be forbidden upon the holy Feasts and lawful Fasts. And a wonder it is how it escaped the gripe of the Clergy so long, who caught at any thing that had but a glance of God's worship in it. And if this were the Subject's Liberty, not to be compelled to swear, surely much more not to be compelled to accuse himself, unless by the Law he be especially bound; for it is *Glanvil's* rule, *Ob infamiam non solet juxta legem terræ aliquis per legem apparentem se purgare, nisi prius convictus fuerit, vel confessus in curia*. But the power of the Clergy now was grown strong, and they begin to remember themselves; and that Oaths are of a holy regard, and they men for holiness best able to judge

Mirror. Just. cap. 5. sec. 3.

Malmsh. de gest. Reg. l. 2.

l. l. Ed. cap. 9.

Bracton, l. 3. c. 7. fo. 106.

Antiq. Brit.
Ecclef. 209.

judge when, and to whom they shall be ministred, and therefore now they begin to enter their claim; and to make a sure Title, they get a grant from Pope Innocent to Steven Langton Arch-bishop of Canterbury, of a *faculty of licensing administration of Oaths during the time of Lent*: and he accordingly enjoyed it during the mad time of Henry the Third. But Edward the First quarrelled it, and left it questionable to Edward the Second, who being in his condition as a lost man, had less care of such smaller matters, and therefore allowed that his *Judges of Assizes* should be licensed by the *Arch-bishop* to administer *Oaths* in their Circuits in the sacred times of *Advent* and *Septuagesima*: and this course continued till Henry the Eighth's time. The *Clergy* having thus gotten the bridle, gallop amain; they now call whom they will, and put them to their *Oaths* to accuse other men or themselves, or else they are excommunicated. Henry the Third withstood this course, if the *Clergy-men's* complaints in the times of that King, *Art. 9*, be true: and notwithstanding the same, the Law holds its course; and in pursuance thereof, we find an attachment upon a prohibition in this form ensuing.

Regist. fo. 36.

Put the Bishop of N. to his pledges, that he be before our Justices, to shew cause why he made to be summoned, and by Ecclesiastical Censures constrained lay-persons, men or women, to appear before him to swear unwillingly at the Bishop's pleasure, to the great prejudice of our Crown and Dignity, and contrary to the custom of the Kingdom of England. And thus both King and Clergy were at contest for this Power over the peoples Consciences, to which neither had the right, otherwise than by rules of Law.

Stat. Bigam.
4 Ed. 1. cap. 5.

Bigamists shall not be allowed their Clergy, whether they become such before the Council of Lyons, or since; and that Constitution there made shall be so construed.

General
Councils.

Whatsoever therefore their *Synods* in those times pretended against the married Clergy, it seemeth by this Law that they had Clergy that were married once and again; and yet before and after the Council, were admitted as Clerks in the judgment of the Law. But the general Council interposes their authority, and deprives them that are the second time married, of all their privileges of Clergy. It was it seemeth twenty years and more after that Council, before the Church-men in England were herein thoroughly reformed; for either some were still *Bigami* at the making of this Law, or as touching that point it was vain; nor is it easy to conceive what occasion should after so long a time move such exposition, the words of the Constitution being, *Bigamos omni privilegio clericali declaramus esse nudatos*. Now whether this slow Reformation arose from the defect in Law, or in obedience thereto, may be gathered from some particulars ensuing. First, it is apparent that the *Canons* of general Councils, *eo nomine*, had formerly of ancient times gotten a kind of preheminance in this Nation; but by what means is not so clear. In the *Saxon* times, they were of no further force than the great Council of this Kingdom allowed by express act. For the *Nicene Faith*, and the first five general Councils, were received by Synodical Constitutions of this Kingdom made in the joint meeting both of the *Laity* and *Clergy*; and during such joint consulting, the summons to the general Councils was sent to the King to send *Bishops, Abbots, &c.* but after that the *Laity* were excluded by the *Clergy* from their meetings, and the King himself

also

also served in the same manner; the Summons to the general Council issued forth to the Bishops immediately, and in particular to each of them, and to the Abbots and Priors in general; by virtue whereof, they went *inconsulto Rege*, and sometimes *Rege renitente*, and appeared either personally or by *proxy*. Others came as Parties, to give and receive direction, or hear Sentence in matters tending to spiritual regards. And for this cause issued Summons even to Kings; as at the Council of Lyons afore-said, it is said, that the Pope had cited *Reges terra, & alios mundi principes, & dictum principem*, meaning Henry the third: the matter was for assistance to the *holy War*, and to determine the matter between Henry the third and his Clergymen. And as in that Case, so in others of that kind, Kings would send their *Embassadors* or *Proctors*, and give them power in their Princes name *interessendi, tractandi, communicandi & concludendi*. First, of such matters *quæ ad reformationem Ecclesiæ universalis in capite & membris*, then of such as concern *fidei orthodoxæ fulciamentum, Regumque ac principum pacificationem*, or any other particular cause which occasionally might be inserted. So long then as Kings had their votes in the general Councils, they were engaged in the maintenance of their decrees; and by this means entred the *Canon-Law* into Kingdoms. Nor was the vote of Kings difficult to be obtained, especially in matters that trenched not upon the Crown; for the Pope (knowing well that Kings were too wise to adventure their own persons into foreign parts where the general Councils were holden, and that it was thrift for them to send such *Proctors* that might not altogether spend upon the King's purse) allowed Bishops and Clergy-men to be *Proctors* for their Princes, that in the *Negative* they might be *pii inimici*, and less active; but in the *Affirmative* zealous; and so make the way wider, by the *Temporal* and *Spiritual Vote* joined in one. Neither did Kings only save their purse, but they also made their own further advantage hereby; for by the engagement and respect which these their *Proctors* had in Councils, they (being for the most part such as were had in best esteem) obtained better Respect to the Cause that they handled, and speedier dispatch.

Nevertheless the case sometimes was such, as could not expect favour; and then as the King's temper was, they would sometimes ride it out with full sail, and to that end would either join with their Ecclesiastical *Proctors* some of the *Barons* and great Men of their Realm, to add to the cry, and make their Affairs ring louder in the years of fame (although the Pope had the greater vote) or otherwise would send an *inhibition* unto their *Proctors* and their assistants; or an *injunction* to look to the rights of the Crown, as Henry the Third did at the Council at Lyons; and this sounded in nature of a *Protest*, and (within the Realm of England) had the force of a *Proviso*, or *Saving*: But if the worst of all come to pass, viz. that the Council passed the cause against Kings without an *Inhibition* or *Injunction*, yet could it not bind the Law of the Land, or Kings just Prerogatives, no not in these times of Rome's hour, and of the power of darkness. For at a Synod holden by Archbishop Peckham, An. 1210, the Acts of the Council of Lyons were ratified, and amongst others, a Canon against *non-residency* and *pluralities*; and yet neither Council nor Synod could prevail; for in Edward the second's time an Abbot presenting to a Church vacant (as was suppos'd) by the Canon of *pluralities*, the King, whose Chaplain was disturb'd, enjoin'd the Abbot to revoke his presentation upon this ground, *Cum igitur, &c.* in English thus: *Whereas therefore that bindeth not our Clerks in our service, in regard that the Kings and Princes of England from*

Bineus tom. 13. Pl. 2. p. 674.

M. Paris.

M. Paris.

An. 1245.

Bineus tom. 3.

P. 2. pag. 913.

& tom. 4. p. 1.

pag. 21.

Fox Mart. P. 2. 263.

Antiq. Brit. Eccles. fol. 209.

time to time have enjoyed that liberty and prerogative, that their Clerks whilst they attend upon their service shall not be constrained to undertake holy things, or to be personally resident on their Benefices, &c.

And if this present Law be considered whereof we now treat, which took leave to enact a sense upon a former Canon so long since made, and (which is all one) to make a general Council (will or nill it) to tread in the steps of an *English* Parliament, or (which is more mean) to speak after the sense of an *English Declaration*, that had not yet attained the full growth of a *Statute*, as was then conceived; it will evidently appear, that the power of a Council, made up of a mixture of a few votes out of several Nations, or the major part of them, being unacquainted with the Laws and Customs of Nations (other than their own) was too mean to set a Law upon any particular Nation contrary to its own original and fundamental Law. And as the *Voters* sent to the general Councils from *England* were but few, so neither were the *Proctors*; as may appear from this, that Pope *Innocent*, out of his moderation, if we may believe it, and to avoid much expence, as he saith, did order that the number of *Proctors* in such cases should be few. But in truth, the times then were no times for moderation amongst Popes and their Officers, and therefore it was another thing that pinched; for multitude of *Proctors*, if their number had not been moderated, might perhaps, if not prevail, yet so blemish the contrary party, that what the *Pope* should get, must cost him loss of spirits, if not blood. And although the Bishops being fast Friends to the *Pope*, by virtue of their Oath, did prevail in power, and the *Pope* had the controul of the Council: yet the exceeding number of the *Proctors*, on the contrary, might render their conclusions somewhat questionable in point of honesty, as being made against the minds of the greater number of persons present, though their votes were fewer. To avoid this difficulty therefore, for the more surety-sake, the Popes enlarged the number of *Voters*; for whereas it seemeth to be an ancient rule, that only four Bishops should go out of *England* to the general Council, in after-ages not one Bishop could be spared, unless in cases of great and emergent consequence (as may appear by the *Pope's* Letter to *Henry* the Third) and the case required it: for the oppressions of the *Pope* began to ring so loud, as the holy Chair began to shake. Neither did Kings confine themselves to any certain number of *Proctors*, notwithstanding the *Pope's* moderation; but as the case required, sent more or less: as unto that Council at *Pisa*, for the composing and quieting that great *Schism* in the Popedom, *Henry* the Fourth sent solemn Embassadors, and with them nigh eighty in all. But unto the Council at *Basil*, *Henry* the Sixth sent not above twelve or thirteen, as Mr. *Selden* more particularly relateth. And unto the Council at *Lyons*, formerly mentioned, the Parliament sent but six or seven, to remonstrate their complaints of the extortions of the Court at *Rome*, their *Legates* and *Emissaries*. The sum of all will be, that the Acts of general Councils were but *Counsels*, which being offered to the sense of the Parliament of *England*, might grow up to the degree of *Laws*, if the Parliament liked them.

Hoveden.
An. 1179.

M. Paris.
An. 1245.

Spicil. 215.

Synod.

Nevertheless, *National Synods* in *England* undertook the quarrel of general Councils: for Archbishop *Peckham*, in a *Synod*, 1280, enjoined the Constitutions made in the Council at *Lyons*, to be observed under a curse, without consultation first had with the Parliament; or before he knew whether they would be right or wrong. And before him *Boniface* made Constitutions in opposition to the customs

customs of the Kingdom; so as the matter was now come to a kind of contest, whether *Synods* or *Parliaments* should hold supremacy in doubtful cases concerning the limits of the Ecclesiastical and Temporal power. For henceforth Kings must bid adieu to the *Synods*, and sit no more amongst them; and *Synods* now think themselves free to consult and determine what they please, without speaking under correction; nor was there other remedy left to Kings but *threats*, by *Writs* directed to the Bishops, *firmiter inhibendo quod, sicut Baronias quas de Rege tenent diligunt, nullo modo præsumant concilium tenere de aliquibus quæ ad coronam Regis attinent, vel quæ ad Personam Regis, vel statum suum, vel statum concilii sui contingunt, quod si fecerint, Rex inde se capiet ad Baronias suas.* Rot. Parliam. 18 H. 3. num. 17.

And this prevailed so effectually, that the Bishops durst not adventure too far, lest they should go beyond their guard; and therefore they come and ask leave of the Parliament in cases that trenched upon the Law of the Kingdom; as they did in the case of *Bastardy*, wherein they would have had their consent, *That Children born before Marriage might be made legitimate by the Marriage subsequent.* And yet they could not prevail; for they were answered, *Nolumus leges Angliæ mutari*, notwithstanding that the *Canon Law* and the *Laws of the Normans* sided with them. And so they obtained not their desire, although they still retained the Tryal of general *Bastardy* unto themselves. Stat. Merton. cap. 9.

Nevertheless the times were such, as *Kings* being too weakly assisted by the people, and the *Clergy* strongly seconded by the *Pope*, they took advantage of those times of distraction, so as to hold themselves no farther obliged to the *King*, than the *Pope* and their own covetousness would allow them: and to make all sure, they had settled it so far as they were able, by a Constitution that the *Clergy* were not bound to aid the *King*, *Papa inconsulto*: and they put it in practice in a Synod under Archbishop *Winchelsea*, Anno 1295, in the time of *Edward* the First; and although the *King* prevailed in the conclusion at that time, yet from the times of *Henry* the Third, the *Clergy* for future times granted their aids to the *King* by themselves, and apart from the rest of the body of the Kingdom, and held themselves not bound by any aid granted by the Parliament; albeit that their own aids granted in their *Synods* were not obligatory unto the body of the *Clergy* in this Kingdom, unless first allowed and confirmed by the Parliament. And thus is *England* become like a two-bodied monster, supported with one pair of Legs. Antiq. Brit.

Of the condition of the Freemen of England, of the Grand Charter, and other Statutes, during the Reigns of these Kings.

SHATTERED asunder by broils of Civil Wars, the *Freemen* having laid aside that regard of the ancient mutual covenant, and bond of *Decenners*, are now become weak, and almost enthralled to the lust of Kings, Lords, Pope, and the *English* Clergy: and therefore it is no wonder if *Taxes* and *Tributes* were many and new, although most of them deserved not to march under any banner but the colours of *oppression*; nor did any thing save them from the worst Tenure of all, but the several interests of those superiour powers which oftentimes did juggle with one another, and thereby gave the *Commons* liberty to take breath; so as though for the present they lost ground, and hunted upon a cool scent, yet they still retained the prey within their view. Sometimes they were cast far behind, other times they recovered themselves: a Truce is cried, and Laws are made to moderate all, and determine the bounds of every one; and thus comes the *Grand Charter* upon the publick Theatre. The Historian saith, it was the same with that of King *John's* framing; and yet by comparing them together, we find them disagreeing both in words and sense; and therefore shall sum the same up as shortly as I can, observing the difference of the two *Charters* as I pass along. The First Chapter concerned the Church, of which sufficient hath been spoken.

cap. 2. *The Freemen shall enjoy these Liberties to them and their Heirs for ever.*

cap. 3. *The Heir in Knight-service shall pay the ancient relief.*

That *Reliefs* were settled by the *Saxons*, hath been already shewed, and also that they were continued and confirmed by *Henry* the First: only in those times they were paid in Horses, Arms, &c. but in after-times all was turned into money, which was more beneficial for all.

cap. 4.
Vide Stat. de
Wardis,
28 E. 1.

Lords shall have their Wards Bodies and Lands after homage received until the full age, though the Ward be formerly Knighted.

Glanv. lib. 6.
c. 1, & 4.

The Law of *Wardship* may seem more anciently seated in this Kingdom than the *Normans* times; for if the Statutes of *Scotland* bear any credit, that Law was in *Scotland* before those times. The Lords were not to have the *Wardship* before they were possessed of the *Tenure*, because it was theirs as a fruit of the *Tenure*, according to the *Saxon* Law concerning distress, that it could not be in the power of the Lord to distrain till he was possessed of the service. And if by fraudulent conveyance the Heir did hold the Lord out of possession, a Writ of *Ward* did lie against him; and if he did not appear, the Lord might seize the Lands, unless in case of *Wardship*, *per causę de guard*.

Stat. Marl.
c. 6, & 7.

And in case the Lord would hold the *Wardship* longer than the full age of the Heir, an *Affize* did lie against the Lord; for the Heir could not enter without *Liv.*

Livery. But if the Heir were of full age at the time of the Ancestor's death, the Lord could not enter the Lands; and yet he should have a *Relief*, and the *primer seisin*. Stat. Marl. cap. 16. and Prerog. Reg. c. 3.

And if the Heir entered the Lands before *Homage* done, he gained no *Free-bold*, though he were *Knighted* before, as this Law provideth. For it may seem that these times of Civil War, brought forth a trick of *Knighting* betimes, as an honourable encouragement for young sparks to enter the field before they were compleat men of discretion to know whether the cause of War was good or evil. And yet reason might induce a conceit, that he that was thought meet to do *Knight-service* in his own person, might expect the maintenance fit for the ability of the person, and honour of the service. Prerog. Reg. c. 13.

Grantees or their Assigns, or Committees of Wardships, shall preserve the Land, &c. from Waste, and the Tenants from extortion.

They shall yield up the same stocked, if they receive them stocked. cap. 6.

The first of these is the Law of common reason; for it is contrary to *Guardianship*, to destroy that which by their office they ought to preserve. As touching the words of the Law, the *Grantees* are omitted in the Charter of King *John*; and also their *Assignees*, albeit that doubtless they were within the intent and meaning of the Law. The matter declares plainly not only the oppression of Lords upon their *Wards*, but also the corruption even of the Law itself, and at the first aimed at the good of the Publick, and honour of *Knight-service*, but now was degenerated into the base desire of profit, by making market of the *Wards* Estates and *Marriages*, that brought in strip and waste of Estates, and niggardly neglect of the education and training up of the persons of the *Wards*, and an imbasing of the generation of mankind, and spoil of times. Nor did these times ever espy, or provide against the worst of these, but only endeavoured to save the estate by punishing the wasters in damages by this Law, and by forfeiture of the *Wardship* by a Law made in the time of *Edward* the First; and this as well for *Waste* done during the time of the custody, as in the life-time of his Ancestors, by another Law in *Edward* the First's time. And because the *Escheators* and their Under-Officers used to serve themselves out of the Estates of *Minors*, before they certified to the King his right; and those were not within the Law of *Magna Charta*, or at least not so reputed: It was therefore afterwards provided, that these also should render damages in Writ of *waste* to be brought against them. Stat. Gloc. c. 5. Stat. de vasto 20 E. 1. Artic. Sup. a cart. c. 18.

The Marriage of Wards shall be without disparagement. cap. 7.

It was an ancient Law among the *Germans*, and the *Saxons* brought it hither, and as a Law settled it, that *Marriage must be amongst equals*; but this the *Danes* and *Normans* slighted, and yet it continued, and was revived. Now as the Lord had the tuition of the *Ward* instead of the Ancestor, so had he the care of the *Marriage* in such manner as the Ancestor might have had if he had lived. For in case the *Ward* were stolen and married, the Delinquent suffered fine and imprisonment. Or if the *Ward* married without the Lord's consent, he shall have the double value, Tacitus mor. Germ.

Stat. Merton. value, and hold the Land over till satisfaction. But in case the Lord marrieth the
cap. 6. *Ward* within fourteen years of age to its disparagement, he shall lose his *Wardship*
cap. 7. thereby. And if the *Ward* refuseth to accept of a *marriage* tendred by the Lord
W. 1. c. 22. before her age of sixteen years, the Lord shall hold the Lands till he have received
the full value; and in case where one Tenant holdeth of divers Lords, the Lords
West. a. c. 16. by priority shall have the *marriage*. These Laws were in use during the Reigns of
those Kings, although it cannot be certainly concluded hereby, that the Wife's
portion properly belonged to the Lord, as for his own benefit; partly because the
Female-Wards should have no advancement, if it belonged to the Lords; and partly
because this forfeiture was given to the Lords in nature of a *penalty*, as appeareth
by the frame of the Statute of *Merton*.

cap. 8. *Widows shall have their Dower, Inheritance, their Inheritance*
Vide Stat. *which they have jointly with their Husbands, their Marriage freely,*
Merton. c. 1. *and their Quarentine.*
& 2.
Prerog. Reg.
cap. 4.

With due regard of the opinion of others, I shall propound my own. It
seemeth to me that the King is within this Law, as well as within the former Laws
of the *Normans*, and those of *Henry* the second, that are of this kind; and as he
is within the compass of every Law of this *Charter*; and that it is called the *Grand*
Charter, as most immediately coming from the King to the people, and not from
the Lords. Nor is there any ground that the Law should intend to give liberty to
Widows of *Wards* belonging to inferior Lords to *marry* whom they will, and that
only the *King's Widows* shall be bound. Nor did this suit with the contest
between the *Barons* and the King, that their *Widows* should be bound unto the
King, and the *Widows* of their Tenants discharged from their tuition; and there-
Mag. Charta. fore I conceive, by the word *maritagium* is not meant liberty of *Marriage*, but her
Marriage portion, or *rationabilis pars*, according to the foregoing Laws of *Henry*
the First, and *Henry* the Second, and the *Saxon* Customs. But as touching the
cap. 9. liberty of *Marriage*, it is defined and expressed, that the *Widows* shall not be
Glanv. lib. 7. compelled to *marry*; nevertheless if they shall *marry*, they must *marry* with the
cap. 12. Lord's liking; otherwise he might have an enemy to be his Tenant, that might
instead of *homage* and *service*, prove *Traitor*, and be his ruin. Lastly, touching
the *Widows dwelling*, the Law thought it unreasonable that she should immediately
after the death of her Husband be exposed to be harbourless, and therefore ordained
that she might continue in her Husband's house *Forty days*, if it were not a *Castle*;
and then she was to have another dwelling assigned to her, because by common in-
tendment she is not supposed to be a person meet to defend a *Castle*: and this was
called her *Quarentine*; which I meet not with amongst the *Saxon* Laws, and there-
fore suppose it to be of *Norman* original.

cap. 10. *No Man's Lands shall be seized for Debt to the King so long as the*
Personal Estate will satisfy. Nor shall his pledge be troubled, so long
as the Principal is sufficient; unless he refuse to satisfy, and then the
pledge shall recover in value.

The first part hereof, was the issue of the Law concerning *elegit*, for-
merly observed in the *Saxon* times; for the regard of Law principally
ex-

extended unto the person, next unto the *Free-bold*, and lastly unto the *goods*. The latter part of this Law was the Law of Pledges or *Decenners* in the same times; unto which the Reader may resort for further light herein.

The City of London, and other Cities, Boroughs, and Towns, and the Cinque-ports, and other Ports, shall enjoy their ancient Liberties. cap. 11.

The whole Kingdom, and the Members thereof herein expressed, had all their Liberties saved from the dint of *Conquest* by the Law of *William* the first; upon *Mag. Char.* which, although some of the succeeding Kings did invade, yet none of them made any absolute *desseisin*, although disturbance in some particulars. But King *John*, did not only confirm them by his grand Charters, but by particular Charters to each Corporation, with some enlargements; and in his grand Charter inserted one clause which in the grand Charter of *Henry* the third appeareth not, which thus ensueth: * *Et ad habendum commune concilium Regni de auxiliis assidendis, aliter quam in tribus casibus prædictis*; which if the barbarism of the *Latin* mislead me not, is thus in *English*: And to have right of Common Council, or to be of the Common-Council of the Kingdom, for the assessing of aids, other than in three cases † *aforsaid*, viz. for redemption of their captive King, for Knighting of the King's Son, and for his Daughter's Marriage: because these three might be due by the Common-Law; the two latter by custom, the former by common right; although mentioned from the late disaster of King *Richard*, which King *John* might with shame enough remember, and expect the same measure from the censure of an unquiet conscience. I shall not enter into debate concerning the omission hereof in the latter Charters; possibly it might seem a tautology. Nor concerning the restriction, as if it did imply that the *Burgeses* had Vote only in cases of general assessments, but shall leave it to the consideration of the Reader.

No Distress shall be taken for greater service or other matter than is due. cap. 12.

Distresses are in nature, no other than a summons in act, or the bringing of a man to answer by seizure of part of his Goods; and it was used by the *Saxons*, as hath been shewed: and because the rich men under colour of seeking their right, many times sought for wrong, and though they could not prevail in the issue, yet prevailed so far, that the Defendant could not escape without charge and hinderance; therefore the Law provided a writ of remedy against unjust vexation, which *Glanvil* remembreth us of: and yet because that remedy also carried with it matter of charge and disturbance to the Plaintiff, and so the remedy might be worse than the disease; therefore the Law defined *distresses* by circumstances of person, matter, time, and place, under penalties of fine and amercement, besides the recompence to the party; first, it must not be taken, but by leave from the King's Court, unless in case of matters due by common Right, and upon complaint made by the Plaintiff. The King sent out a Summons in this

* And that they may have (Representatives) in the Common-Council of the Kingdom, for assessing (granting) of Aids, &c. post 173.

† I conceive the Aids in those three Cases were due by the Common Law of both Britons, Romans, Saxons, &c. and so did not fall within the ordinary Rule of new Aids, which seem intended by the words *supra*.

this manner: *Henricus Rex Ang. Hominibus Abbatis de Ramsay, salutem. Precipio quod cito & iuste reddatis Abbati Domina vestro quicquid ei debetis in censu, & firma, & debitis, & placitis; quod si nolueritis, ipse vos inde constringat per pecuniam vestram.*

Gloss. 215. And in all cases of matters due by *common right*, the *distress* never was done in an arbitrary way, but by Judicial Act in the Lord's Court. Secondly, no *distress* for suit shall be made out of the *Fee*, nor against any person, but such as are of that *Fee*, Nor shall any *distress* be made in the King's *High-way* or open street, but by the King's Officer, and special Writ; because *distress* is incident to service, and that is due as from the *Fee*: and therefore by *common right* the same must be recovered from the *Fee*, and such as owe service in the same; but the *High-way* or open street are more properly a *Franchise* belonging to the King, although the Soil haply may be the Lords. And therefore it was an old Law, that they should be under the King's safeguard, *Sit pax publica per communes vias*; and no violence must be there tolerated but by the King's special Writ, which presupposeth the especial notice taken by the King of the nature of the occasion. A moderation also must be observed in the taking of the *distress*, for it must not be excessive; and also in keeping thereof: for if the owner will, he may *replevy* the same according to the ancient course; and the Sheriff must grant *replevy* if it be demanded, although formerly no *replevy* was without a special Writ; and yet that also not always readily obeyed: for the times were such, as the Lords were bold with the King's Courts and Ministers, and refused the order of the Law. Now in such cases wherein the matter concerned contempt of the King's Authority, a Fine was set upon the Offender; but in case it concerned only a *Tort* done to the party, he was amerced: the one is called *Redemption*, because the penalty otherwise must lie upon the *person*, if it be not redeemed by pecuniary Fine; the other is called *Amercement*, which is originally a satisfaction unto the party wronged, by recompence out of the *personal Estate* of the Delinquent. Thirdly as touching the matter of the *distress*, it must not be of *Plough-beasts* or *Sheep*, unless in case of *damage fasant*, if other *distress* may be had; for the Law had a care of such Cattle as were most of publick concernment, and which was the main stock of subsistence, so far as Justice would allow. And therefore the unjust taking of any man's Cattel by any person whatsoever, is liable to the same penalties that unjust *distresses* are. Fourthly, concerning the using of the *distress*, it must not be sold, no not in the King's case, till fifteen days be past, after it is taken; nor must it be carried out of the County, but it must be so *impounded* as the owner may come to feed it; and it must be discharged if the owner give security of satisfaction before the return of the Writ. Fifthly, the intent of the *distresses* must be that which is just, and therefore not for other suit than by the Feoffment is due, or else by Prescription; and in case many are jointly seized, the suit shall be by one, and the rest shall contribute. Nor must any man be compelled to shew his Title to his Land by *distress*.

Marlb. c. 21. Ll. Inz. Marlb. c. 21. Glanv. l. 12. cap. 12. Mag. Char. Miror. cap. 5. Sec. 3. Distric. Scac. Artic. Mag. Cart. cap. 12. West. l. c. 16. Marlb. c. 4. Distric. Scac. Artic. sup. Cart. cap. 12. Marlb. c. 9. cap. 22.

cap. 13.

The Common pleas shall be bolden in one certain place.

The office of Judge of the *Common-pleas*, was, in my opinion, distinct and several from that of the *Crown-pleas*; nor though one and the same man might execute both Authorities, doth it therefore follow that it was by one and the same power; as if being Judge, he had thereby power in all matters of the *Common-pleas*, and

and also of the Crown. For though it be true that *Bracton* saith, The King hath one proper Court wherein are the Chief Judges, which both by his own Testimony, and *Briton's* also, did hear and determine Causes of all sorts; yet it is true also, that it was by *Appeal*, or *Writ of Error*, as in case of false Judgment; and that the King had *plures curias*, which doubtless had their proper work. And in the time of *Henry* the second, it is clear that six were especially assigned for the *Common-pleas* throughout the whole Realm; and yet by another special Commission, or Letters-Patents, the same men might also have power to determine matters of the Crown, as at this day, in their several Circuits. This Law therefore doth not, as I conceive, work any alteration, but only in this, that whereas formerly the Judges of *Common-pleas* attended on the King's Court continually, as all other Judges did; and whither the King removed, they did the like, which was a great uncertainty and grievance unto the Commons; henceforth they are fixed to a certain place.

Affize of Novel Disseisin and Mortdancerster shall be determined in the proper County only, and by the Justices itinerant sent by the King or his Chief Justices.

The Law was so declared in *Henry* the second's time, and was questionless put in practice, so far forth as with convenience to the Judges might be; but now the convenience of the people is preferred, and they must not be brought up to the King's Court, but the Justices must come down to them. And yet in case of difficulty, the Bench, where the *Common-pleas* are holden, must determine the matter; and where the time in the *Itar* in one County is too scant, the *Remanets* shall be adjourned over to be tried elsewhere in that Circuit: which sheweth that the Judges *itinerant* had their time proportioned out to every County. These Tryals also were so favoured, as in the then holy times of *Advent*, and *Septuagesima* or *Lent*, they might be tried; which although it was gained by Prayer made by the King to the Bishops, as the words of that Law are concluded, yet it shews that the Parliament had so much light as to hold the time not *inherently holy*, but merely *sequestered* by the Will of the Clergy. The Plaintiffs also in *Mortdancerster* may be divers, if there be divers Heirs of one Ancestor by one Title. And if there be Joint Tenants, and the Writ be against but one, and the same pleaded, the Writ shall abate; but if joint-Tenancy be pleaded, and the Plea be false, the Defendant shall be fined and imprisoned. And if in the Action the Verdict be for the Plaintiff, he shall recover Damages.

Darrein presentment shall be taken only in the common Bank.

Tryals in the *common Bank*, or other Courts at *Westminster*, have ever had an honourable esteem above those in the County by *Nisi prius*, although all be equally available. This might be one cause why the Titles of Churches were still retained at the *common Bank*, whenas all other rode Circuit; for that Churches affairs in those times were of high regard. Speed of Tryal also was not little regarded herein; for Justices by *Nisi prius* properly were but for enquiry, till the Statute at *Westm.* the second made them of *Oyer* and *Terminer* in the cases of *Quare Impedit*, and *Darrein presentment*, and gave them power to give Judgment. And thus the Commons gained still in point of conveniency.

cap. 15.

Freemen shall be amerced according to the degree of the fault, saving to them their Freehold, and to Merchants their main Stock, and to Villains their Waynage; and Clergymen shall be amerced according to their Lay-fee. Barons shall be amerced by their Peers, others by their Vicinage.

Marlb. c. 19.

Westm. 1.
cap. 6.Miror. cap. 5.
sect. 4.

In this, regard is to be had first of the persons that are to be amerced, then of the parties by whom, and lastly, of the nature and quantity of *Amercements*. The persons amerced are ranked into four Classes: *Barons, Clergy, Freemen, and Villains*. But in regard of the parties by whom they are to be amerced, they are but two; *Barons, and Freemen*; for the *Clergy, Villains and Freemen*, are to be amerced by the *Freemen* of the Neighbourhood. In what Courts these *Amercements* shall be, the Stat. *Marlbr.* tells us, not before the *Escheator*, nor other that make enquiry by Commission or Writ, nor before the Justices of Assize, or Oyer and Terminer, but only before the Chief Justices, or Justices *itinerant*. The Statute of *Westminster* adds a fifth Classis of Cities and Towns, by express words; which seems not so necessary, unless in pillaging and oppressing times: for they were taken to be within the Statute of *Magna Charta*, though not therein named. The rule of the quantity of *Amercements* is now set down in general, and left to the discretion of the *Peers* or *Vicinage*, which formerly by the *Saxons* were specially set down in the Law. The rule in general is with a *ne plus ultra*, viz. not further or more than that the party amerced may spare, and yet hold on in the maintainance of his course, according to his degree. And it must be also according to the quantity of the offence; for the greatest *Amercements* must not be ranked with the least offences: so as in every degree the main sustenance of the party is saved; yea, the *Villains* (however mean they be) they must have their maintenance. And this sheweth that *Villains* had a maintenance [and property,] which was under the protection of the Law, and not under the gripe of their Lords to all intents, unless they were the *King's Villains*, who it seemeth were meerly under the King's mercy, as being both their Lord and King, against whom they could hold nothing as properly their own. And therefore in all other cases, even then the *Villains* were born under a kind of liberty, as in the *Saxons* time formerly hath been declared; which the Law protected against their own Lords.

cap. 17. & 18.

No man shall be compelled to make, repair, or maintain any Bridges, Banks, or Causeways, other or otherwise, than they were wont to be made, repaired, or maintained in the time of Henry the second.

Miror. c. 5.
sect. 2.

The limitation to the times of *Henry the second*, sheweth that his Justice was such as maintained the common rights of men; but in the times of *Richard the first*, and more especially of *King John*, those Rivers, Waters, and Fishings formerly used in common, were encroach'd upon, enclosed, and appropriated to particular men's uses; which occasioned many Bridges, Banks and Causeways to be made and repaired, to the great charge of private men: all which are discharged by this Law.

cap. 19.

No Sheriff, Constable, Coroner, or other Bayliff, shall hold any Pleas of the Crown.

Eschea-

Escheators are also expressed in the books of *Magna Charta*, and the *Abridge-^{Mag. Char.}* ments, however it seemeth that it is within the intent of the Law, which was made to avoid the extraordinary oppression that these Officers exercised upon the people. For *Escheators*, under colour of inquiry of Estates of men, would inquire of matters concerning the lives of men; and Sheriffs that had power of Tryals in cases of Theft, as hath been already shewn, abused the same for their own benefit, because in such cases they had the forfeitures. This Law therefore takes away such occasions, viz. from the Sheriffs and Coroners, and Bailiffs or Justices (other than by express commission thereto assigned) all power to hold Pleas of the Crown by trial, leaving unto them nevertheless, power of enquiry, of which anciently they had the right. ^{Ll. Hen. 1. cap. 8. Glanvil. lib. 1. cap. 2.}

If the King's Tenant dieth supposed in arrear, an Inventory shall be made of his Stock by honest men, but it shall not be removed till Accounts be cleared; and the overplus shall go to the Executors, saving to the Wife and Children their reasonable part. ^{cap. 20.}

The first clause hereof was a Law in Henry the first's time, and a customary Law in Henry the second's time, being a remedy against an old Norman Riot of the Lord's seizure of the whole personal Estate of the party deceased, under colour of a Law. The second part concerning the over-plus, hath this additional subjoined in the Charter of King John: *If any Free-man die intestate, his Chattels shall be divided by his Parents and his Friends in the presence of the Church, saving to every one their proper debts.* And thus since the Conquest, the Church-men encroached by degrees unto a great power in matters Testamentary I say by degrees: for as yet by this Law it appeareth, that they were but Overseers or Eye-witnesses; for as to right of ordering or disposing they had none, as may appear in that case of a Bastard dying without Issue and intestate, the Lord shall have his personal Estate: And in all cases the Executor had then nothing but bare Assets, and the overplus was assigned between the Wife and Children, according to their reasonable part. Or if the party died intestate, the next friends did administer, paying the Debts, and making Dividend of the overplus into the reasonable parts; according to the ancient Saxon custom still continued. Nor doth the testimony cited out of *Bracton*, prove any other than that the Ancestor hath free power to order his Estate as he pleaseth, and that the Children shall have no more than is left unto them by their Ancestor, either in his Will, or in case of dying intestate, by the Custom or Law, which is, and ever was the *rationabilis pars*. ^{Glanv. lib. 7. cap. 5. Glanv. lib. 7. cap. 16. Bracton. Coke Instit. 2. pag. 33.}

No purveyance for any Castle out of the same Town where the Castle is, but present satisfaction must be made: and if in the same Town, satisfaction must be made within forty days. ^{cap. 21.}

Purveyance was ancient provision for the necessities of the publick, and so far was commendable, seeing it is not the common case of all men to regard the publick above their own private interest; therefore the publick must provide for it self, by their means in whom the publick is most concerned. And this was in those elder times, but in two cases, viz. of Kings and Castles; in the one of which the publick Government is principally concerned, in the other the publick defence,

Mag. Chert. defence. For it may be well conjectured, that *Castles* were either first made in places commodious for habitation, and great Towns gathered to them for their better safety; or that the Towns were first gathered in places of commodious habitation, and then *Castles* were made for their better defence. Or if they were imposed upon them by the Victor to keep them in awe, they were nevertheless by continuance together become tractable, and conspired for the mutual defence of each other. But as touching such Cittadels or *Castles* that were set in solitary places, they may seem rather first intended for the particular defence of some particular Man and his Family and neighbouring Tenants; and therefore in the *purveyance* for *Castles* it seems the proper Town wherein it is, is principally liable to that duty, because their safety is more principally interested: and therefore *Prizes* there taken, may be paid at a day to come; but in all other places Immediately. Nevertheless this lasted not long; for the Soldiers found out a trick for favouring their own Quarters, and preserving them in heart against a back Winter, knowing that at such times it is better to seek for provision nigh than to be compelled to seek it far off. But this Stratagem was cut off by the next King, who inhibited all manner of *purveyance* in any other Town, than in the same Town wherein the *Castle* is seated. This was a charge that was but temporary and occasional: That which was more lasting and burdensome upon the Subjects, was *purveyance* for the King; which nevertheless cannot be avoided, by reason of the greatness of his Retinue, especially in those days; and if they should have their resort to the Market, the same could not be free to the people, for that the first service must be for the King's Household, and so what seraps will be left for the *Commons*, no man can tell. It was therefore necessary for the King's Family, to be maintained by *purveyance*; and to avoid the many inconveniencies which might and did arise in those spoiling times, it was ordained, 1. *That it should be Felony for any Purveyor to purvey without Warrant.* 2. *That none but the King's Purveyor must purvey for the King's house, and that he must purvey only for the King's house; and to purvey no more than is necessary; and to pay for the things they take.* And because Kings were often times necessitated for removal from place to place, *purveyance* of carriage was also allowed: And in case the Subjects were grieved, either by more *purveyance* than was necessary, or by non-payment for the commodities so taken, or with composition for the King's debts; for such *purveyance*, the Offenders were liable to fine and imprisonment. Or if they were grieved by *Purveyors* without Warrant, the Offender was to have been proceeded against as in case of Felony.

West. 1. c. 7.
Artic. super cart. cap. 1.
West. 1. c. 32.
Artic. super cart. cap. 2.
cap. 22.

He that serveth in Castle-guard, is not liable to payment of Rent for that service; nor is he compellable to either, so long as he is in the service in the Army.

By the ancient custom none but a *Knight* might be charged with the guard of a *Castle* belonging to the King, for the letter of this Law mentioneth only such; and therefore to hold by *Castle-guard*, is a Tenure in *Knight-service*. And it seemeth that Rent for *Castle-guard* originally was consistent with *Knight-service*, and that it was not annual, but promiscuously Knights might either perform the service, or pay Rent in lieu thereof; and upon occasion did neither, if the King sent them into the field. And lastly, that a *Knight* might either do the service in his own person, or by his *Esquire*, or another appointed by him thereto.

No Knights, nor Lords, nor Church-mens Carriages, nor no man's Wood shall be taken against the Owner's consent; nor shall any man's Carriages be taken, if he will pay the Hire limited by the Law. M. g. Chart. cap. 23.

Church-men were exempted from charge to the King's Carriages, meerly in favour to the Canon, which exempted the Goods of the Clergy from such Lay-service; nevertheless the complaints of the Clergy formerly mentioned, shew that this was not duly observed. Knights and Lords were discharged not only for the maintenance of their Port, but more principally because they were publick servants for the defence of the Kingdom in time of War: and the Kingdom was then equally served by themselves and their equipages, and their carriages, as a necessary assistant thereunto.

The King shall have no more profit of Felons Lands than the year and a day, and the Lord is to have the remainder. cap. 24.

Anciently the Lords had all the Estates of Felons, being their Tenants, and the King had only a Prerogative to waste them, as a penalty, or part thereof; but afterwards the Lords by agreement yielded unto the King the year and a day's profit, to save the Lands from spoil: and in continuance of time the King had both the year and day, and waste. Fugitives also were in the same case, viz. such as deserted their Country either in time of need, or such as fled from the Tryal of Law in criminal cases; for in both cases the Saxons accounted them as common Felons. Nevertheless the two customs of Gloucester and Kent are saved out of this Law by the Statute: the first whereof saves the Land to the Heir from the Lord, and the second saves the same to the Heirs Males, or for want of such, to the Heirs Females; and to the Wife her moiety untill she be espoused to another man, unless she shall forfeit the same by fornication during her Widowhood. And by the same Law also the King had all Escheats of the Tenants of Archbishops, and Bishops, during the vacancy, as a perquisite. But Escheats of Land and Tenement in Cities or Burroughs, the King had them in jure coronæ, of whomsoever they were holden. Instit. 2. Brañt. lib. 3. fol. 137. Prerog. Reg. cap. 16. Prerog. Reg. cap. 14. Fitz. 2. E. 22. Tit. Escheat. 11.

All Wears shall be destroyed, but such as are by the Sea-coast. cap. 25.

The Lieutenant of the Tower of London, as it seemed, claimed a Lordship in the Thames, and by virtue thereof had all the Wears to his own use, as appeareth by a Charter made to the City of London, recited in the second Institutes upon this Law; and this was to the detriment of the Free-men, especially of the City of London, in regard that all Free-men were to have right of free passage through Rivers, as well as through Highways; and purprestures in either were equally noxious to the common liberty. And therefore that which is set down under the example or instance of the Rivers of Thames and Medway, contained all the Rivers in England; albeit that other parts of the Kingdom had not the like present regard as the City of London had.

The Writ of precipe in capite shall not be granted of any Freehold, whereby a man may be in danger of losing his Court thereby. cap. 26.

Mag. Chart.

It seemeth that it was one of the oppressions in those times, that if a Suit were commenced in the inferior or Lord's Court, concerning a *Freehold*, a Writ of *precipe in capite* might be had, upon a Surmise that the *Freehold* was holden *in capite*; which might prove an absolute destruction to the inferiour Court, and was the spoil of the Demandant's case: and therefore I think the Charter of King *John*, instead of the word *Court*, hath the word *Cause*.

cap. 27.

There shall be but one known Weight and Measure, and one breadth of Cloaths, throughout the Realm of England.

Ll. Edgar.
c. 8.

This Law of *Weights* and *Measures* was anciently established amongst the *Saxons*, as formerly had been shewed, and continued, in the *Normans* times, and confirmed by *Richard* the first and King *John*. And as touching the *measure of the breadth of Cloaths*, although it might seem to abridge the liberty of particular persons, yet because it was prejudicial to the common Trade of the Kingdom, it was settled in this manner to avoid deceit, and to establish a known price of Cloaths. And it seemeth that Wine was ordinarily made in *England* as well as Ale; otherwise the Measures of Wine could not have been establish'd by a Law in *England*, if they had been altogether made in other Countries.

cap. 28.

Inquisition of Life and Member shall be readily granted without Fees.

This was a Law of latter original, made to take away a *Norman* oppression; for by the *Saxon* Law, as hath been already noted, *No man was imprisoned for Crime (notailable) beyond the next County-Court or Sheriff's Torn*: but when those rural Courts began to loose their power, and the King's Courts to devour Tryals of that nature, especially by the means of the *Justices itinerant*, which were but rare, and for divers years many times intermitted; during all which time, supposed Offenders must lie in Prison; which was quite contrary to the liberty of the *Free-men* amongst the *Saxons*: This occasioned a new device to save the common liberty by special Writs sued out by the party imprisoned or under bail, supposing himself circumvented by hatred and malice; and by the same directed to the Sheriff and others, an Inquisition was taken, and Tryal made of the Offence, whether he deserv'd *loss of Life or Member*; and if it were found for the supposed Offender, he was bailed till the next coming of the *Justices*: and for this the Writ was called the *Writ of inquisition of Life or Member*; and sometimes the Writ *de odio & atia*. But these *Inquests* were soon become degenerate, and subject to much corruption, and therefore as soon met with a countercheck from the Law: Or first rather a regulation; for it was ordained, that *the Inquest should be chosen upon Oath*; and *that two of the Inquest at least should be Knights*, and those not interested in the Cause. But yet this could not rectify the matter; for it seemeth so impossible to do Justice and shew Mercy this way, that the Writ is at length taken away, and men left to their lot till the coming of *Justices itinerant*. But this could not be endured above seven years; for though the King be a brave Soldier, and prosperous, yet the people overcome him, and recover their Writs *de odio & atia* again.

West. 1.
c. 11.

Gloucester. c. 9

West. 2. c.
29.

Lords

Lords shall have the Wardships of their Tenants Heirs, although they hold also of the King in Petit Serjeanty, Socage, Burgage, or Fee-farm. Mag. Chart. cap. 29.

Inferiour Lords had the same right of Wardships with the King for their Tenures in Knight-service, although their Tenants did hold also of the King; unless they held of him in Knight-service, which was a service done by the Tenant's own person, or by the person of his Esquire, or other deputy in his stead. But as touching such service as was wont to be done to him by render, or serving him with Arms, or other utensils; this was no Knight-service, though such utensils concerned War, but was called Petit Serjeanty, as in the Law-books doth appear. Glanv. lib. 7. cap. 9. Nevertheless Henry the Third had usurped Wardships in such cases also, and the same amongst others occasioned the Barons Wars.

No Judge shall compel a Free-man to confess matter against himself upon Oath, without complaint first made against him. Nor shall receive any complaint without present proof. cap. 30.

This Law in the Original is set down in another kind of phrase in the first part thereof, which is obscure by reason thereof: in exprefs words it is thus; *No Judge shall compel any man ad legem manifestam*; which implieth, that the matter was otherwise obscure, if the party that was complained of, or suspected, did not manifest the same by his own declaring of the truth, or matter enquired after; and therefore they used in such cases to put him to Oath, and if he denied the matter, or acquitted himself, the Judge would sometimes discharge him, or otherwise put him to his Compurgators*; and this was called *lex manifesta*, or *lex apparens*. And it was a trick first brought in by the Clergy, and the Temporal Judges imitated them therein; and this became a snare and sore burthen to the Subjects. To avoid which, they complain of this new kind of Trial; and for remedy of this usurpation, this Law reviveth and establisheth the only and old way of Trial: for *Glanvil* saith, *Ob infamiam non solet juxta legem terræ aliquis per legem apparentem se purgare, nisi prius convictus fuerit vel confessus curia*: and therefore no man ought to be urged upon such difficulties, unless by the exprefs Law of the Land. The old way of Trial was, first to bring in a Complaint, and Witnesses ready to maintain the same; and therefore both Appeals and Actions then used to conclude their pleas with the names of Witnesses subjoined, which at this day is implied in those general words, in their conclusions, *Et inde producit sectam suam*; that is, he brings his sect or suit, or such as do follow or affirm his complaint; as another part also is implied in those words, *Et hoc paratus est verificare*. For if the Plaintiffs sect or suit of Witnesses did not fully prove the matter in fact, the Defendant's Averment was made good by his own Oath, and the Oaths of Twelve men, and so the Trial was concluded. Braft. f. 106. Seld. super. Hengham.

No Free-man shall be imprisoned or disseised of his Freehold or Liberties, outlawed, or banished, or invaded, but by the Law of the Land, and Judgment of his Peers. Nor shall Justice be sold, delayed, or denied. cap. 31.

Z

This

* This Law of Compurgators was used in many Cases among the Britons. See Ll. Hoeli sparfum.

Mag. Charta.

This is a comprehensive Law, and made up of many Saxon Laws; or rather an enforcement of all Laws, and a remedy against oppression, past, present, and to come. And concerneth first the *person*, then his *livelibood*; as touching the *person*, his *life*, and his *liberty*; his *life* shall be under the protection of the Law, and his *liberty* likewise, so as he shall be shut into no place by Imprisonment, nor out of any place by Banishment; but shall have liberty of ingress or egress. His *Estate* both real and personal shall also be under the protection of the Law; and the Law also shall be free, neither *denied* or *delayed*. I think it needless to shew how this was no new Law, but a confirmation of the old, and reparation added thereto, being much impaired by stormy times; for the sum of all the foregoing discourse tendeth thereto.

cap. 32.

Merchants shall have free and safe passage, and trade without unjust Taxes, as by ancient custom they ought. In time of War, such as are of the Enemies Countries shall be secured till it appear how the English Merchants are used in their Countries.

That this was an ancient Law, the words thereof shew, besides what may be observed out of the Laws of *Ætbeldred*, and other Saxon Laws. So as it appeareth, that not only the *English Free-men* and Natives had their liberties asserted by the Law, but also Foreigners, if Merchants, had the like liberties for their persons and goods, concerning Trade, and maintenance of the same, and were hereby enabled to enjoy their own under the protection of the Law, as the *Free-men* had. And unto this Law the *Charter* of King *John* added this ensuing:

It shall be lawful for every Freeman to pass freely to and from this Kingdom, saving Fealty to the King, unless in time of War; and then also for a short space, as may be for the common good, excepting Prisoners, Outlaws, and those Country-men that are in enmity, and Merchants, who shall be dealt with as aforesaid.

And it seemeth that this Law of *free passage* out of the Kingdom, was not anciently fundamental, but only grounded upon *reason of State*, although the *Free-men* have liberty of free passage within the Kingdom according to that original Law, *Sit pax publica per communes vias*; and for that cause, as I suppose, it was wholly omitted in the Charter of *Henry the Third*; as was also another Law concerning the *Jews*, which because it left an influence behind it, (after the *Jews* were extinct in this Nation) and which continueth even unto this day, I shall insert it in this short sum:

After death of the Jew's debtor, no usury shall be paid during the minority of the Heir, though the debt shall come into the King's hand. And the debt shall be paid, saving to the Wife her Dower and Maintenance for the Children, according to the quantity of the Debtor's Land, and saving the Lord's Service; and in like manner of debts to others.

The whole doctrine of *Usury* fell under the Title of *Jews*; for it seemeth it was their Trade, and their proper Trade hitherto. It was, first that I

met with, forbidden at a *Legatine Council* near 300 years before the Normans times: but by the *Confessor's Law* it was made penal to *Christians* to the forfeiture of Estate, and Banishment: and therefore the *Jews* and all their substance were holden to be in nature of the *King's Villains*, as touching their Estate; for they could get nothing, but was at his mercy. And Kings did suffer them to continue this Trade for their own benefit; yet they did regulate it as touching Infants, as by this Law of King *John*; and the Statute at *Merton*, doth appear. But *Henry the Third* did not put it into his *Charter*, as I think, because it was no liberty of the Subjects, but rather a prejudice thereto; and therefore *Edward the First* wholly took it away by Statute made in his time, and thereby abolished the *Jews*.

Mag. Char.
Concil. Brit.
299.
Ibid. 623.
Glanvil. l. 7.
cap. 16.
M Paris.
An. 1229.
Merton cap. 5.
Stat. de Judaif.
An. 18 E. 1.

Tenants Lands, holden of Lands escheated to the King, shall hold by the same services as formerly. cap. 33.

In all alienations of Lands, sufficient shall be left for the Lord's distress. cap. 34.

Submitting to the judgment of the learned, I conceive that as well in the Saxon times as until this Law, any Tenant might *alien* only part of his Lands, and reserve the services to the alienor, because he could not reserve service (upon such *alienation*) unto the *Lord Paramount*, other than was formerly due to him, without the Lord's consent; and for the same reason could they not *alien* the whole Tenancy, to bind the Lord without his express licence, saving the opinion in the book of *Affizes*, because *no Tenant could be enforced upon any Lord, lest he might be his Enemy*. Nevertheless, it seemeth that *de facto* Tenants did usually *alien* their whole Tenancy; and although they could not thereby bar the Lord's right, yet because the Lord could not in such cases have the distress of his own Tenant, this Law saved so much from *alienation* as might serve for security of the Lord's distress. But Tenants were not thus satisfied; the Lords would not part with their Tenants, although the Tenants necessity was never so urgent upon them to sell their Lands; and therefore at length they prevailed by the Statute of *Quia emptores* to have power to sell all, saving to the Lords their services formerly due: and thus the Lords were necessitated to grant Licences of *alienation* to such as the Tenants could provide to buy their Lands. Nor was this so prejudicial to the Lords in those days, when the publick quiet was settled, as it would have been in former times of War, whenas the Lord's right was maintained more by might, and the aid of his Tenants, than by Law, which then was of little power.

Prerog. Reg.
cap. 7.
20 aff. pl. 17.
18 Edw. 1.
West. 3. c. 1.

The 35th Chapter I have formerly mentioned in the Chapter concerning the Clergy. cap. 35.

No Man shall be appealed by a Woman for the death of any but her own Husband. cap. 36.

The right of *Appeal* is grounded upon the greatest interest. Now because the Wife's interest seemeth wholly to be swallowed up in her Husband, therefore she shall have an *Appeal* of the death of him only; and such also was the Law in *Glanvil's* time. How far this point of interest shall extend to the degrees of *Consanguinity*, the *Norman Law* formerly hath shewn. And against whom *Appeals*

Mag. Chart. did lie, the Statute at *Westminster* tells us, viz. not only against the principal, but
 West. 1. c. 14. also against accessories; yet not against them till the principal be attainted. And
 West. 2. c. 13. because it was ordinary for men of nought to appeal others in a malicious way,
 it was by another Law established, that if the party appealed was acquitted, the
 appellant should not only render damages, but be imprisoned for a year.

cap. 36.

The County-Court shall be holden at the wonted time.

*The Torn shall be holden at the accustomed place twice in the year,
 viz after Easter and Michaelmas.*

The View of Frank-pledges shall be holden at Michaelmas.

The Sheriff shall not extort.

The Sheriff's Courts had now lost somewhat of their Jurisdiction, though for
 time and place they are confirmed *statu quo*, to the end that through uncertainty
 thereof the suiter might not make defaults, and be amerced. Yet they lost much
 of their respect within the compass of these few years by two Laws; the one of
 Merton c. 10. which, made at *Merton*, allowed all suiters to the rural Courts to appear by Proxy
 or Attorney, which it seemeth had power to vote for the Masters, in all cases
 publick and private; and did not only themselves grow into parties and maintenance
 of Quarrels, and so spoiled these Courts of their common Justice, but rendered
 the *Free-men* ignorant and careless of the common good of the Country, and given
 over to their own private interest. And though the corruption of Justice was soon
 West. 1. c. 33. felt, and against it a Law was provided, viz. *That the Sheriff should not allow of
 such corrupt Attorneys*; yet this was no cure to the *Freemen*, who were still suffered
 to wax wanton at home, albeit that they were discharged from doing their suit in
 Marl. c. 10. all other Hundreds but that wherein they dwell. The second Law that took away
 Ibid. much honour from these Courts, was that Law at *Marlbridge*, that discharged the
 Baronage of *England* and the Clergy from their attendance at such service; and
 this also opened the door wider to oppression. For where greatness is, it carrieth
 therewith honour from the meaner sort, and a kind of awe and stop unto the minds
 of such men that otherwise would riot without restraint: and though it might also
 be said, that the presence of great men in such Courts would oversway the meaner,
 and make strong parties; yet it must also be acknowledged, that these parties being
 greater are the fewer, and do not so generally corrupt all sorts, as the corruption
 of the meaner sort do. It is said by the wise man, *Where the poor oppress the poor,
 it is like a raging rain that leaves no food*. The last branch in this Law is an in-
 hibition to the Sheriff from extortion; and surely there was great need, and much
 more need than ever, now that the Lords and Clergy are absent. It was thought
 that the great occasion of the Sheriff's oppression was from above; I mean from
 Artic. super. the King, that raised the values of the Farm of Counties granted to the Sheriffs;
 cart. c. 13, 14. for in those days Sheriffs gave no accounts, as of later times they have done; and
 Stat. de vice- therefore the Charter of King *John*, between the 17th and 18th Chap. inserteth this
 com. An. 9 E. Clause, *Omnes Comitatus & Hundred. Wapentag. & Trethingi sint ad antiquas firmas,
 2. absque ullo incremento, exceptis Dominicis Maneriis nostris*. But this did not work the
 work, although it took away occasion; for the humour was fed from within, and turn-
 ed to a fore upon that place that could never be cured to this day. Nor could the
 wisdom

wisdom of times find other help to keep the same from growing mortal, but by *Mag. Chart.* scanting the dyet, and taking away that power and jurisdiction which formerly it enjoyed.

The 37th Chapter hath been already noted in the Chapter of the Clergy next *cap. 37.* foregoing.

Escuage shall be taxed as was wont in the time of Henry the *cap. 38.*
second.

The Charter of King John hath superadded hereunto this ensuing provision: There shall be no Escuage set in the Kingdom, except for the redeeming of the King's person, making of his eldest Son a Knight, and on marriage of his eldest Daughter; and for this there shall be only reasonable aid*. And in like manner shall the aids of the City of London be set. And for the assessing of Escuage, we will summon the *Vide ante, 125, 161.* Archbishops, Bishops, Abbots, Earls, and greater Barons of the Kingdom, specially by our several Writs; and will cause to be summoned in general by our Sheriffs and Bailiffs all other our Tenants in capite, to be at a certain day after Forty days at the least, and at a certain place; and we will set down the cause in all our Writs. And the matter at the day appointed shall proceed according to the counsel of those that shall be present, although all that were summoned do not come. And we will not allow any man to take aid of his Freemen, unless for redemption of his body, and making his eldest Son a Knight, and on marriage for his eldest Daughter; and this shall be a reasonable aid only.

Thus far the Charter of King John concerning this point of Tax or Assessment; and if the History saith true, the Charter of Henry the Third was one and the same *M. Paris.* with that of King John, then either this was not left out in Henry the Third's Charter, in that Historian's time; or if it was omitted in the original, it was supposed to be included in the general words of the Law, as *being accustomed in times past.* And then these particulars will be emergent: First, that the Aids and Escuage in Henry the First's time, were assessed by the same way with that in this Charter of King John; for that all the quarrel between the Lords and King John, was *M. Paris.* concerning the Charter of Henry the first, which the Lords sware to maintain. *An. 1214,* Secondly, that neither Aids nor Escuage were granted, or legally taken, but by *1215.* Act of Parliament, although the rate of them was settled by common custom, *25 Edw. 1. c. 6.* according to the quantity of their Fee. Thirdly, that some Parliaments in those *34 Edw. 1. c. 1.* times, as concerning such matters, consisted only of such men as were concerned by *West. 1. c. 36.* way of such charge, by reason of their Tenancy: for Escuage only concerned the Tenants by Knight-service, and therefore those only were summoned unto such * Parliaments as only concerned Escuage. Nor had the City of London nor the *Ante 161.* Burgeffes right to vote in such cases, it is said *p. 258.* And thus the Forest-Laws that were made in the time of Richard the First, were made by the consent of Archbishops, Bishops, Abbots, Earls, Barons, and Knights of the whole Kingdom: for what the great men gained, they gained for themselves and their Tenants. *Hoveden 445.* And the truth is, that in those times, although publick damage concerned all, yet it was ordinary for Kings to make a shew of summoning Parliaments, whenas properly they were but Parliamentary meetings of some such Lords, Clergy, and others, as the King saw most convenient to drive on his own design. And therefore we find

Mag. Charta.

Gloss. tit.
Baron.

find that *Henry* the Third about the latter part of his Reign, when his Government grew towards the dregs, he having in the Kingdom Two hundred and fifty *Baronies*, he summoned unto one of these Parliamentary meetings but Five and twenty *Barons*, and One hundred and fifty of his Clergy. Nevertheless, the Law of King *John* was still the same; and we cannot rightly read the Law in such Precedents, as are rather the birth of will than reason. Fourthly, that no *Aids* were then granted, but such as passed under the title *Escuage*, or according thereunto; for the words are, *No Escuage shall be demanded, or granted, or taken, but for redeeming the King's person, Knighting of his Son, or marriage of his Daughter*. Nor is the way of assessing in these times different, saving that instead of all the *Knights*, two only are now chosen in every County; the Tenure (as it seemeth) first giving the Title of that Order, and both Tenure and Order now changed into that Title taken up for the time and occasion. Fifthly, that it was then the ancient custom, and so used in the time of *Henry* the First, that the advice of those then present, was the advice of the whole, and that their advice passed for a Law without contradiction, notwithstanding the King's *Negative voice*; for the words are, *The matter at that day shall proceed according to the counsel of those that shall be present, although all do not come*; and therefore that clause in the King's Oath, *quas vulgus eligerit*, may well be understood in the future, and not in the preter tense. Last of all, though not gathered from the Text of this Law whereof we treat, yet being coincident with the matter, it is observable, that though the Clergy were now in their ruffles, and felt themselves in their full strength, yet there befel a posture of state that discovered to the world, that the *English* held not the interest of the Clergy to be of such publick concernment, or necessary concurrence in the Government of the Kingdom, as was pretended. For the Clergy finding Assessments of the *Laity* so heavy, and that occasions of publick charge were like to multiply daily, they therefore, to save the main stock, procured an Inhibition from *Rome* against all such impositions from the *Laity*, and against such payments by the Clergy; and in the strength of this they absolutely refuse to submit to aid *Edward* the First by any such way, although all the Parliament had thereunto consented. And thus, having divided themselves from the Parliament, they were by them divided from it; and not only outed of all privilege of Parliament, but of all the privilege of Subjects, into the state of *præmunire*: and thus set up for a monument to future times, for them also to act without the consent of those men, as occasion should offer. But *Henry* the Third not satisfied with this ancient and ordinary way of Assessment upon ordinary occasions, took up the extraordinary course of Assessment upon all the *Freemen* of the Kingdom, which was formerly taken up only in that extraordinary occasion of redeeming of the King's or Lord's person out of captivity, and common defence of the Land from piracy; and under the Title of *Dane-gelt*, which was now absolutely dead, and hanged up in chains as a monument of oppression. Nevertheless, it cannot be denied but that in former times the *Freemen* were as deeply taxed, if not oppressed with payments to their Lords at such times as they were charged over to the King in the cases aforesaid, as by the latter words of the Law aforesaid of King *John* doth appear, and whereby it is probable that the inferiour Lords were gainers*. The conclusion of the Charter of *Henry* the Third (the same suiting also with the third observation foregoing) doth not a little favour the same: for it is expressly set down, *that in lieu of the King's confirmation of the Charter of Liberties aforesaid, not only the Archbishops, Bishops, Abbots, Priors, Earls,*

* When any Aids were charg'd on the Lords, they charg'd it over on their Tenants, See *Gilb. Hist. Excheq.*

Earls, Barons, and Knights, but also the Freemen, and all the Kingdom, gave a *Mag. Charta*.
fifteentb of all their moveables.

And thus have I summed up and compared both the Copies of the *Grand Charters* of England's Liberties, (saving two particulars inserted into the Forest-Laws of Henry the Third) wherein if any thing had been new and unreasonable, King John might have colour to except against them as extorted by force; and Henry the Third might (as he was advised) plead *nonage*, and so they might have been choaked in their birth; but being all *Consuetudines*, as in the conclusion they are called, and Kings ashamed to depend upon such frivolous exceptions, it may be wondred what might move them to adventure so much blood-shed, and themselves into so many troubles, to avoid their own acts; unless the writing of them were an obligation acknowledged before the world; and they resolving secretly to be under none, were loth to publish the same to all men. It is a strange vanity in great men to pretend love to Justice, and yet not endure to be bound thereto; whenas we see that God himself loves to be bound by his word, and to have it pleaded, because he delights as much to be acknowledged true in performing, as good in promising. But neither was King John or Henry the Third of this spirit; fain they would undo, but could not. It is true, it was at the first but a King's *Charter of Confirmation*; and had Kings been patient therewith, it might have grown no bigger: but by opposition it rooted deeper, and grew up unto the stature of a *Statute*, and settled so fast, as it can never be avoided but by surrender from the whole body.

Having thus summed up the Liberties of the Subjects and *Freemen* of England under this *Charter*, I shall make some Appendix hereunto, by annexing a few additional in these times established; and although they come not within the letter of the *Grand Charter*, yet are they subservient thereunto. And first concerning the King; and this either as he is King, or as he is Lord. As King, he had these *Prerogatives* above all Lords.

The King shall have the custody of Fools and Ideots Lands for their maintenance, and shall render the same to their Heirs. Prerog. Reg. cap. 9.

And concerning Mad-men and Lunaticks, the King shall provide a Bailiff for their maintenance, rendering account to them when they are sober, or to their Administrators. cap. 10.

It is no less liberty or privilege of the People, that *Fools* and *Mad Persons* are to be ordered by *Tutors*, than Children; and therefore this may be annexed to the rest of the Liberties as well as the other. Nevertheless, it seemeth that the Laws took them into their regard, in respect of their Estates, which might be abused to the prejudice of the Publick, rather than out of any respect had to their persons. Now because there is a difference between the disability of these persons, the one being perpetual, the other temporary; therefore is there also by these Laws a difference in the disposal of their Estates: for the *Tutor* had a right in the disposing of the one, and but a bare authority or power in providing for the other. Secondly, the person of the *Tutor* is to be considered: Anciently it was the next kindred, grounded, as I conceive, upon the natural affection going along with the blood; and

Braet. lib. 5.
cap. 20.

Lib. 1. c. 10.

Prerog. Reg.

cap. 11.

West. 1. c. 4.

Marib. c. 17.

Braet. lib. 2.
cap. 37.

Merton. c. 1.

cap. 2.

Braet. lib. 2.

cap. 40.

and this so continued in custom until these times: for though the *Mirroure of Justice* saith, that *Henry* the First brought in that course of giving the custody of these disabled persons to the King, as hath been formerly observed; yet *Braeton*, that wrote long after the time of *Henry* the First, speaking of these kind of persons, saith, *Talibus de necessitate dandus est tutor vel curator*; not so much as mentioning the King in the case. And in another place, speaking of such as are *alieni juris*, saith, that *some are under the custody of their Lords, and others under their parents and friends*. But let the time of the entrance of this Law be never so uncertain, it is now a declared Law, that the King in such cases is the common *Curator* or *Tutor* of all such persons, as he is a *Chief Justice*, rendring to every one his right.

The King shall have the Wrecks of the Sea.

What shall be called a *Wreck*, the Statute at *West. 1.* declareth, viz. *Where the Ship so perisbeth, that nothing therein escapeth alive*; and these are rather in their original committed to the King as a *Curator*, than given him as a *Proprietor*; although that Custom hath since settled a kind of right, which may perhaps be accounted rather a Title by Estoppel. For the fundamental ground is, that the right owner cannot be manifested, and therefore the King shall hold it; and if the right owner can be manifested, the King shall hold it till the owner doth appear.

The Heir in Socage-tenure shall have an Action of Waste, and an account against his Guardian for the profits of the Lands and Marriage.

The Heir in *Socage* being under age, shall also be under custody of such Guardian of the next kindred, who cannot challenge right of Inheritance in such Lands so holden: as if the Lands descended from the Father's side, the *Mother*, or next of the kindred of the Mother's side, shall have the *custody*; and so if the Lands descend from the Mother, the *Father*, or next kindred of the Father's side, shall have the *custody*. And this custody bringeth with it an Authority or Power only, and no Right, as in case of the Heir in Knight-service; and therefore cannot be granted over as the Wardship in Knight-service might, but the *Guardian in Socage* remaineth accomptant to the Heir, for all profits both of Land and Marriage. The full age of *Tenant in Socage*, is such age wherein he is able to do that service, which is Fourteen years; for at such age he may be able by common repute to aid in Tillage of the ground, which is his proper service. But the Son of a Burgeſs hath no set time of full Age, but at such time as he can tell Money, and measure Cloth, and such work as concerns that calling.

Widows deforced of their Dower of Quarentine, shall by Action recover damages till they recover their Dower.

They shall also have power to devise their crop arising from her Dower.

It was used that the Heir should have the crop with the Land; but this Sta-

Statute altered that former usage, and, yet saved the Lord's liberty to distrain if any services were due.

Writs de consimili casu granted in cases that fall under the same Law, and need the same remedy; and such Writs shall be made by agreement of the Clerks in Chancery, and advice of such as are skilful in the Law. ^{West. 2. c. 24.}

It was none of the meanest Liberties of the *Freemen of England*, that no Writs did issue forth against them, but such as were anciently in use, and agreed upon in Parliament. And it was no less a grievance and just cause of complaint, that Kings used to send Writs of new impression to execute the dictates of their own wills, and not of the Laws of the Kingdom; as the complaints of the Clergy in the times of *Henry the Third* do witness. Nevertheless, because many men's cases befel not directly within the Letter of any Law for remedy, and yet were very burthensome; for want of remedy it is provided by this Law, that such emergent cases that do fall within the inconvenience, shall be comprehended within the remedy of that Law. ^{M. Paris addit. Artic. 44.}

Aid to make the Son of the Lord a Knight, and to marry his eldest Daughter, shall be assessed after the rate of twenty shillings for a Knight's Fee; and twenty shillings for twenty pounds in yearly value of Socage-tenure. ^{Westm. c. 36.}

The uncertainties of *Aids* are by this Law reduced and settled, as touching the sum; and thereby delivered the people from much oppression which they suffered formerly. Nor was only the particular sum hereby, but also the age of the Son when he was to be made a Knight, viz. at the age of Fifteen years; too soon for him to perform Knight-service, but not too soon for the Lord to get his money. And the Daughter likewise was allowed to be fit for Marriage at Seven years of age, or at least to give her consent thereto, albeit that in truth she was neither fit for the one or other: and therefore it must be the Lord's gain that made the Law; and it was not amiss to have the aid beforehand, though the marriage succeeded not for many years after; and if the Lord died in the interim, the Executors having Assets paid it, or otherwise his Heir.

C H A P. LXVIII.

Of Courts and their Proceedings.

BESIDES the Courts of Justice *itinerant*, which were ancient, as hath been said, other Courts have been raised of later birth, albeit even they also have been of ancient constitutions, and divers of them *itinerant* also, and some of them settled in one place. The work of the Justices *itinerant* was universal, comprehending both the matters of the Crown and Common-pleas. That of *Oyer and Terminer* is only of Crown-pleas originally commenced and enquir'd of by themselves,

selves, and granted forth upon emergent crimes of important consequence that require speedy regard and reformation. Justices of *Gaol-delivery* have a more large work, that is, to deliver the Gaols of all criminal offenders formerly indicted, or before themselves. Justices of *Affize* and *Nisi prius* are to have cognizance of Common-pleas only, and for the most part are but for enquiry. All which, saving the Justices *itinerant* in ancient use, were instituted about these times; and therewith ended both the work and common use of the ancient *iters*; and yet all these later Courts, jointly considered, have not the like comprehensive power that the *iters* had, for they had the power of hearing and determining all causes, both of the Crown and Common-pleas albeit in a different manner: That is to say, in the first times promiscuously united into one and the same person; but soon after the *Norman* times and more clearly in the time of *Henry* the Second, that power was divided into several persons, some sitting upon the *Common-pleas*, others upon the *Crown-pleas*. The Judges of these journeying Courts were specially assigned by the King, as in the case of the *Gaol delivery*; or settled by the Law upon the Judges of both Benches at *Westminster*, as in case of *Oyer* and *Terminer*, and of the *Affizes* or *Nisi prius*, saving that in the last case they were associated with Knights in the Counties for the taking of *Affizes*.

West. 2. c.
29.
Ibid. c. 30.

Fleta.
Artic. sup.
cart. c. 15.

5 E. 4. fol.
129.

Artic. sup.
cart. c. 3.

Stat. Glouc.
c. 8.

West. 1. c.
23.

Now concerning the Courts that were settled; some were settled or annexed to the King's personal residence, as the *Chancellor's Court*; for in these times it began to have a judiciary power of eminent stature, and growing out of the decays of the great *Chief Justice of England*. Then also the *King's-Bench* was annexed by the same Law unto the King's Court or personal residence, as it anciently ever had that honour; although it seems the endeavours were to make it like the *Common-pleas* in that particular. Another and last Court that was settled in this manner, was the *Marshal's Court*, which in the original only concerned the King's household, but afterwards compassed in a distance of the neighbouring places, because the King's attendants were many in those times, whenas the Courts of Justice continually attended on his person: and this precinct was called the *Verge*; and all cases of debt and covenant, where both parties were of the Household, and of *Trespases vi & armis*, where one of them was of the Household, were handled in the Court of the *Verge*, or the *Marshal's Court*. And Inquests of death within the same, shall be taken by the *Coroner* of the County with the *Coroner* of the Household. Other Courts were rural, and affixed also to some certain place, either of the County or Town, or other particular place. That of the county suffered in these times great dimunition, even almost to destruction, by a Law restraining the power thereof only to *Trespases* of 40 s. value or under: for though formerly the King's Justices incroached upon the County-Court, and contracted suits before themselves, which by the ancient Law they ought not; yet it was ever illegal, and the County-Courts held their right till this Law was made, which kept under those inferiour Courts, and made them of less account than formerly. Nevertheless, the King's Justices, or Writ to the Sheriffs, oftentimes enableth the inferiour Courts to have cognizance of cases of greater value. Lastly, a rule was set to the smaller Courts of Corporations, Fairs, and Markets, viz. *That no person should be sued in any of them, which was not a debtor or pledge there.*

C H A P. LXIX.

Of Coroners, Sheriffs, and Crown-Pleas.

Coroners shall be chosen in the County, from the wisest, greatest, Coroners. West. 1. c. 10.
and chief Men of the Country.

Of these Officers formerly hath been spoken, as touching their election, qualification, and work: this Law brought in no change of any former Law, but only of a former Custom gained by these degenerating times, which brought men into place that were far unfit, who otherwise of poor and mean condition maintained themselves by bribery and extortion, and being found guilty had not sufficient to give recompence. This Law therefore revives the first Law, and holds these men to their work of taking *Inquests* and *Appeals*, by indenture between themselves and the Sheriff; and these were to be certified at the next coming of the Justices.

The Freeholders in every County, if they will, shall elect their own Sheriff, unless the Sheriffrick be holden in Fee. Sheriff. Artic. sup. cart. c. 9.

This was indeed the ancient custom: as the Officers of the Kingdom were eligible by the Common-council of the Kingdom, so were all the Officers of the County chosen by the County. But within a few years in the time of *Edward* Mirror. cap. 1. Sec. 3. Stat. de vic. 9. E. 2. the Second, comes another Law, *That the Sheriffs shall be appointed by the Chancellor, Treasurer, Barons of the Exchequer, and the Justices.* Which Law was made in favour of the people, as by the file of that Statute doth more fully appear: for though at the first blush it may seem a privilege lost by the *Freemen*, that these great men should have the election of the *Sheriff*; yet it proved a great advantage to the common quiet of the people in those times of parties, and was so apprehended: Otherwise as the case stood in those days of *Edward* the Second, it was no time for him to gain upon the people's Liberties. Nor had the Statute of *Articuli super cartas*, whereof we now treat, been penned with these words, *if they will.* And questionless in these days we now live in, if the people had but a little taste of this seeming liberty of electing *Sheriffs* in the County-court, as formerly it was used, it would be soon perceived that the election of these chief Officers were better disposed in some other hand, if rightly pursued.

Homicide by misfortune shall not be adjudged murder. Ch. nce-mealy.

That the *Saxons* made difference between Homicide by *misfortune*, and that which was done *felleo animo*, or *with a spirit of gall*, formerly hath been shewed: now what it was that altered the case I cannot say, unless the violence, cruelty, and oppression of the times. Formerly all kind of Manslaughter was *finable*, I mean in the *Norman* times, and so might more rationally be ranked into one degree; but now the punishment began to change from *forfeiture of Estate* and *loss of Member*, to *death* and *forfeiture of Estate*; and therefore it was more necessary to make

make the difference in the *penalty* (seeing in the *fine* formerly a difference was observed) and this difference to assert by a Law, that might limit the invenomed spirits of the Judges of those days.

Robbery.

Robbery punished by death.

This crime hitherto was punished by *fine* and *loss of Member*, at the utmost, but is now made capital, and punished with death. One example whereof, and the first that Story maketh mention of, we find of an *Irish* Nobleman in the days of *Henry the Third*, who suffered death for *piracy*; and it was a Law that then, though rigorous, yet seasonably was contrived, to retard the beginnings, and hasten the conclusion of a Civil War in a Nation who value their Estates and Liberties above their own Lives.

Rape.

West. 1. c. 13.

Rape, upon the complaint of the party violated made within forty days, shall have right. If the Delinquent be convicted without such complaint made, he shall be fined and imprisoned.

West. 2. cap.

34.

Before this Law, this crime was but *finable*, unless the fact was committed upon a *Virgin*, for then the member was lost. And this was the *Saxons* Law; but the *Normans* inflicted the loss of the member upon all Delinquents in any *Rape*. Nor was this made *Felony* by any Law or Custom that I can find, till about these days. It is true, that *Canutus* punished it *capitis aestimatione*, by way of compensation; which rather gives a rule of damages to the party wronged, than importeth a punishment inflicted for an offence done against the Crown, as if it were thereby made *capital*. But for the more certainty of the penalty, another Law provideth, that if the *Rape* be committed without the Woman's consent subsequent, she may have an *Appeal of Rape*. And though a consent be subsequent, yet the Delinquent upon indictment found shall suffer death as in the case of *Appeal*. But if a Wife be carried away with the goods of her Husband, besides Action of the party, the King shall have a *fine*. If the Wife *elopeth*, she shall lose her *Dower*, if she be not reconciled before her Husband's death. All which now-recited Provisoes are comprehended together in one Chapter, and yet the Chapter is *partee per fess*, *French* and *Latin*. So far thereof as concerneth death, was written in *French*, being the most known Language to the great men in general, many of whom were *French*, by reason of the interest that *Henry the Third* had with *France* in his late Wars against the *Barons*. It was therefore published by way of Caveat, that no person that understood *French* might plead ignorance of the Law that concerned their lives. The residue of that Chapter was written in *Latin*, as all the other Laws of that Parliament were, upon grounds formerly in this discourse noted. One Proviso more remaineth, which is also comprehended in the same Chapter with the former, *viz.* *Any person that shall carry away a Nun from her house, shall suffer imprisonment for three years, and render damages to the house.* This crime was formerly only inwombed in the *Canon-Law*, and now born and brought forth into the condition of a *Statute-Law*, rather to vindicate the right of the *Freemen*, than in any respect had to the *Clergy*, who had been very bold with the liberty of the *Freemen* in this matter. For Archbishop *Peckham*, not

a year before the making of this Law, for this offence had excommunicated Sir Osborn Gifford; nor could he get absolution but upon his Penance. First he was disciplin'd with rods three times; once in the open Church at *Wilton*, then in the Market-place at *Shaftsbury*, and lastly in the publick Church there: Then he must fast divers months. Lastly, he must be disrobed of all Military habiliments, viz. Gilt Spurs, Sword, Saddle, golden Trappings, and to use no brave garments but russet, with Lamb and Sheep-skins; to use no Shirt, nor take up his Order again, until he had spent three years Pilgrimage in the Holy Land: and unto this Penance the Knight by Oath bound himself. A strange power! and to repress which, it was time for the people to look about them, and rather to punish Delinquents themselves, than to leave it to the will of such men as never had enough.

Concealment, or neglect of apprehending of Felons, punished by Fine and Imprisonment. Concealment of Felons. West. 1. c. 9.

In those ancient times, pursuits of *Felons* with *Hue and Cry* were made by Lords of Manors, Bailiffs of Liberties, Sheriffs, and Coroners; whereas now they are made by Constables. See more in the Chapter of Peace. *Escapes* also were punished with *Fine and Imprisonment*: and in some places the Lord had the *Fine*, in other places the Sheriff, and in some cases the King; yet in no case was any *Fine* assessed or taken till the Trial before the Justices. West. 1. c. 3.

Persons defamed for Felony, not submitting to Trial by Law, shall be committed to close imprisonment. Defamed Felons. West. 1. c. 11.

It hath been accounted an extreme construction of this Law, and questionless so it is, that this Law should warrant that punishment of pressing to death, which hath been of later times more constantly used than former times ever knew of: for though it be granted that some trick of torture was sometimes used, even before the *Normans* times, and so might now and then leave some few examples after the *Norman* times; yet did the Law never patronize such courses, especially if the death of the party suspected ensued thereupon, but accounted it Manslaughter. Mirror. cap. 11. sec. 9. And the end of this Law was not to put a man to death, but to urge him to confess: and so *Briton* saith, Such as will not submit to Trial, shall be put to Penance till he shall pray to be admitted thereunto; and therefore the Penance then used was such as did not necessarily infer death; nor was it a final Judgment in the Trial, but only a means thereto: and therefore it might rather consist in denial of conveniencies, than inflicting of pain. Now in what cases it was used, may be understood from the manner of the Indictments in those days, whereof (besides Appeals by the party) some were of particular *fact* done; others only of a *Fame*: and it may be conceived that the course in the second was, that if a man would not submit, but would *stand mute*, he was put to this kind of Imprisonment; for the discovering Law was by *Henry the Third* taken away. But if the Delinquent was positively accused of a Felony, and thereupon indicted by a witness of the Fact, and then if the Delinquent would not submit to his Trial by Law, in such case the final Judgment was to die, *Onere, fame, &c.* because in the one was a *Fact* affirmed against him by Witness, and in the other only a *Fame* or suspicion. Briton cap. 4. sec. 24. Glan. lib. 10. cap. 1.

cion, which is not pregnant against the life of a man. But this manner of Indictment being now laid aside, and all proceedings being upon a *Fact* affirmed against the party, I conceive this Law of no use at all in these days.

Bail.
West. i. c. 15.

Bail shall not be allowed to Outlaws, fore-jured, Thieves taken in the act, notorious Thieves, appealed persons, burners of Houses, breakers of Prison; false Coiners, counterfeiters of the Broad-seal, prisoners upon excommunication, open Malefactors and Traitors against the King.

Glanv. lib.
14. cap. 1.

The six first are in nature of persons attainted either upon their own confession, or such manifest Evidence as in common reason cannot be gainsaid; all which were before this Law under bail; yea, the last of all, although the most heinous of all, was in the same condition. As touching *breakers of Prison*, in these times it was *Felony*, for what cause soever they were committed; and therefore their imprisonment was without bail: for whoso makes no Conscience of breaking the Prison, his credit will little avail. Yet it must be acknowledged, that the Law imprisoned few without bail in those foregoing times, but in case of *Felony* or execution: but afterward the cases of commitment being ordinary, even in matters of mean process, and because mens credits waxing weak by the weakness of their estates, now wasted by the Civil Wars; therefore in *Edward the Second's* time a Law was made to restrain the *Felony* in such cases, only to the *breach of Prison by such as were committed for Felony*. And as touching Imprisonment upon Excommunication, it is manifest, that within five years before the making of this Law, it was complained that such were set at liberty by the King's Writ *de homine replegiando*, without the Bishop's consent. But now the *Clergy* had gotten the day of the Law, which did much decline from that guard of imprisonment, but hated perpetual imprisonment. Nor was this complaint grounded upon any other Law than that of the Canon; for the Common Law ever held the supreme cognizance of Excommunication, within its own power, as upon the Writ *de quare excommunicato* may appear. Other crimes are yet also by this Law allowed bail, such as are persons indicted of *Larceny*, before Sheriffs, &c. persons imprisoned upon slight grounds, Receivers, and Accessories before Felony, Trespassers, persons appealed by *provers* after the death of the *approvers*. If bail be granted otherwise than the Law alloweth, the party that alloweth the same shall be fined, imprisoned, render damages, or forfeit his place, as the case shall require. And thus the iniquity of the times was so great, as it even forced the Subjects to forgo that which was in account a great liberty, to stop the course of a growing mischief.

Adit. M.
Paris.

Spreades of
false News.
West. i. c.
39.

Publishers of false News, whereby discord or slander may arise between the King and his people, shall be imprisoned till he produce the Relator.

It is therefore an offence against the *Crown*, to procure or maintain an ill conceit in the King of the people, or an ill conceit in the people of the King; and it is as well an offence against the *Crown* for the King to conceive ill of his people, as for them of him. But all must be grounded upon falsehood; for truth

respects

respects no man's person; and all men are equally bound by that woe, if they call good evil, or evil good; although difference must be made in the manner of representation. And upon this ground of maintaining strife, was a Law made also against Conspiracy to make or maintain Indictment, Suit, or Quarrel; and it was likewise finable. ^{33 Edw. 1.}

Redisseisors and Postdisseisors found upon verdict before the Sheriff, Coroners, and Knights, shall be imprisoned. ^{Merton. c. 3.}

Formerly *Redisseisin* was under no other Law than that of *Disseisin*, but by this Law made a matter belonging to the *Crown*, and tried before the same Judges that had the power of enquiry of all offences against the *Crown*. The penalty of imprisonment in this case, was to be without bail, but only by the King's Writ *de homine replegiando*; and yet even thus the penalty was not sufficient to restrain the offence, and therefore a Law was made to abridge the power of that Writ, as touching such offender; and they became irremediable as touching their liberty by that Writ; besides that upon recovery had against them they lost double damages. ^{Marlb. c. 8. West. 2. c. 26.}

Trespassers in Parks and Fish-ponds convicted within a year and a day, shall render damages, suffer imprisonment for three years, and give security of good behaviour for time to come. If any beasts be taken in a felonious manner, he shall be proceeded against as a Robber. ^{Trespassers upon Parks. West. 1. c. 10.}

From the times of King *Steven*, the Lords and great men endeavoured to advance their power and greatness so high above the meaner sort of *Freemen*, as they made Kings continually jealous of their power. *Castles* had been a bone of long contention between them, but they being for the most part taken away, the strife was about *Prisons*, and power to imprison offenders; and that also after much opposition they laid aside. Yet the violence of these times being such, as (though *Felonies* were somewhat dreaded) *Trespases* of the highest nature were little regarded, such as were riotous hunting in their *Parks*, and fishing in their *Waters*; the Lords and great men made it their last request, that at least in such cases they might have power to imprison such as they found so trespassing; but this was also denied them, though by *Henry* the third in his first time, when as yet the Government was not worsted by projects of Arbitrary power, or corrupt Counsels of *Foreigners*, nor himself a man able to sway with the Lords in matters that were of doubtful prerogative. And to speak indifferently, it is better for the Liberty of the Subject, that the power of imprisonment should be regulated only by the King's Writ ordered by Law, than by the Warrants of great men, especially in their own cases; and therefore in this matter the King's Prerogative, was a patron to the *Freemens liberty*. Nevertheless, these great men give not thus over their game: for though in times of publick calamities, little place is left for pleasure to any man; yet when times are grown to more quiet, pleasure revives, and the great men renew their motion: and though they could not obtain prisons to their own use, as they endeavoured at the meeting at *Merton*; yet now they obtain the King's prisons to the use of a Law that was as good as their own, and there- ^{Merton. c. 11.}

thereby satisfied their own displeasure for the loss of their pleasure. And yet this Law sufficed them not, but they obtain a further privilege, that such persons as are found so trespassing, and refusing to submit, may be killed without peril of Felony.

C H A P. LXX.

Of the Militia during these Kings Reigns.

THE Soldiery of England may be considered, First, in regard of the Persons. Secondly, their Arms. Thirdly, their Service. The Persons were as formerly, not only such as were Milites, or Tenants in Knight-service, but also such as served at the Plough; and concerning them both, it is to be considered what the Law made by Edw. II. holdeth forth.

Stat. de Milit.
2 E. 2.

All such as ought to be Knights and are not, shall be distrained to undertake the weapons of Knighthood, if they shew not cause to the contrary.

Regularly all Tenants by Knight-service ought to be Knights, but *de facto* were not; so as in these times there was a further work to make a man a Knight than his bare Tenure; for such only were *milites facti*, who had both Lands sufficient to maintain the Arms and State of a Knight, and also a body fit to undertake the service in his own person, and whereof he had given sufficient proof in the field. Others that had Land, either had not sufficient maintenance, or not habiliments of person, and as not expected were laid aside; of this sort were many, by reason of the late Civil Wars, in which they had much impaired both their Bodies and Estates. This rendered the strength of the Kingdom and Militia so much decayed, and the minds of men so wearied, that they began to love ease before the times would brook it, and a cessation from Arms before they had any mind to peace. The Parliament espied the danger, and how necessary it was for the people to be well armed in these times of general broil; and upon that ground allowed this Law to pass; *That all such as had Lands worth 20 l. yearly besides Reprizals, should be ready* (not to be Knights, nor, under the favour of others, is there any ancient precedent to warrant it, but) *to find, or to enter into the field with the Arms of a Knight, or to provide some able person to serve in their stead, unless they were under 21 years of age, and so not grown up to full strength of body; nor their Lands in their own possession, but in custody of their Lords or Guardians.* Nevertheless, of such as were grown to full age, yet were maimed, impotent, or of mean estate, and Tenants by service of a Knight, it was had into a way of moderation, and ordered that such should pay a *reasonable fine* for respite of such service; nor further as concerning their persons were they bound. But as touching such that were under present only, and not perpetual disabilities of body upon them incumbent, as often as occasion called, they served by their deputies or servants: all which was grounded not only upon the Law of Henry the second, but also upon common right of Tenure.

The Arms that these men were to find, are said to be those belonging to a Knight; which were partly for defence, and partly for offence. Of the

the first sort were the *Shield*, the *Helmet*, the *Hauberk*, or *Breast-plate*, or *Coat of Mail*; of the second sort were the *Sword* and *Lance*; and unto all a *Horse* must be provided. These *Arms*, especially the defensive, have been formerly under alteration; for the *Breast-plate* could not be worn with the *Coat of Mail*, and therefore must be used as occasion was provided of either: and for this cause the service of a Knight is called by several names; sometimes from the *Horse*, sometimes from the *Lance*, sometimes from the *Helmet*, and not seldom from the *Coat of Mail*.

The power of immediate command, or calling forth the *Knights* to their service, in its own nature was but ministerial, and subservient to that power that ordered War to be levied: and therefore, as in the first *Saxon* Government under their Princes in *Germany*, so after, under their Kings, War was never resolved upon, *Tacitus*. but if it were defensive, it was by the Council of Lords; if offensive, by the general Vote of the Grand Council of the Kingdom. So by virtue of such Order, either from the Council of Lords, or Grand Council, the Knights were called forth to War, and others, as the case required, summoned to a rendezvous: and this instrumental power regularly rested in the Lords, to whom such service was due; and the [inferiour] Lords were summoned by the Lord Paramount, as chief of the Fee, of which their Tenants were holden, and not as King or chief Captain in the Field: for they were not raised by Proclamation, but by Summons issued forth to the Sheriff, with distress; and this only against such as were within his own Fee, and held of the Crown. The King therefore might have many *Knights* at his command, but the Lords more; and if those Lords failed in their due correspondence with the King, all those of the inferiour Orb were carried away after them: so the King is left to shift for himself as well as he can. And this might be occasioned not only from their *Tenures*, by which they stood obliged to the inferiour Lords, but probably much more by their popularity, which was more prevalent, by how much Kings looked upon the *Commons* at a further distance in those days, than in after-times, when the *Commons* interposed intently in the publick Government. And thus the *Horsemen* of *England* becoming less constant in adhering to their Sovereign in the Field, occasioned Kings to betake themselves to their *Foot*, and to form the strength of their Battles wholly in them, and themselves on foot to engage with them.

One point of liberty these Soldiers by *Tenure* had, which made their service not altogether servile; and that was, that their service in the Field was neither indefinite, nor infinite, but circumscribed by place, time, and end. The time of their service for the continuance of it was for a set time, if it were at their own charges: and although some had a shorter time, yet the general sort were restrained to *forty days*. For the Courage of those times consisted not in wearying and wasting the Soldier in the Field by delays, and long work in wheeling about and retiring, but in playing their prizes like two Combatants of resolution to get Victory by Valour, or to die. If upon extraordinary occasions the War continued longer, then the Tenant served upon the pay of the common Purse. The end of the service of the Tenant (*viz.* their Lord's defence in the defence of the Kingdom) stinted their work within certain bounds of place, beyond which they were not to be drawn, unless of their own accord: And these were the borders of the Dominion of the Crown of *England*, which in those days extended into *Scotland* on the North, and into a great part of *France* on the South. And therefore the Earl-Marshal of *England* (being

Walsing. l. 65.
& 71.

Stat. Mort.
7 Edw. 1.

Stat. de Milli-
tibus.

by *Edward* the first commanded by virtue of his *Tenure* to attend in person upon the Standard under his Lieutenant that then was to be sent into *Flanders*, which was no part of the Dominion of *England*) refused; and notwithstanding the King's threats to hang him, yet he persisted, swearing, *He would neither go nor hang*. Not only because the Tenants by *Knight-service* are bound to the defence of their Lords persons, and not of their Lieutenants; but principally because they are to serve for the safety and defence of the Kingdom: and therefore ought not to be drawn into foreign Countries. Nor did the Earl-Marshal only this, but many others also, both Knights and Knights fellows, having twenty pounds *per Annum*; for all these with their Arms were summoned to serve under the King's pay in *Flanders*. I say, multitudes of them refused to serve, and afterwards joined with the rest of the *Commons* in a Petition to the King, and complained of that Summons as of a common Grievance, because that neither they nor their Ancestors were bound to serve the King in that Country: and they obtained the King's discharge under his broad Seal accordingly. The like whereunto may be warranted out of the very words of the Statute of *Mortmain*, which was made within the compass of these times; by which it was provided, That in case Lands be aliened contrary to that Statute, and the immediate Lords do not seize the same, the King shall seize them, and dispose them for the defence of the Kingdom, *viz.* upon such services reserved as shall suit therewith: as if all the service of a *Knight* must conduce thereto; and that he is no further bound to any service of his Lord, than will consist with the safety of the Kingdom. This was the Doctrine that the sad experience of the latter Government of Kings in these times, had taught the Knighthood of *England* to hold for the future Ages.

No Tenant in ancient Demesnes, or in Burgage, shall be distrained for the service of a Knight.

Clerks and Tenants in Socage of other Manors than of the King, shall be used as they have been formerly.

Tenants in *ancient Demesne*, and Tenants in *Burgage*, are absolutely acquitted from foreign service; the one, because they are in nature of the King's Husbandmen, and served him and his Family with Victual; the other, because by their *Tenure* they were bound to the defence of their *Burrough*, which in account is a Limb or Member of the Kingdom, and so in nature of a *Castle-guard*. Now as touching *Clerks* and Tenants in *Socage* holding of a Subject, they are left to the order of ancient use appearing upon Record. As concerning the Clergy, it is evident by what hath been formerly noted, that though they were importunate to be discharged of the service Military, in regard that their profession was for Peace, and not for Blood; yet could they never obtain their desire: for though their persons might challenge exemption from that work, yet their Lands were bound to find Arms by their Deputies; for otherwise it had been unreasonable, that so great a part of the Kingdom as the Clergy then had, should sit still and look on, whilst by the Law of Nature every one is engaged in his own defence. Nor yet did the profession of these men to be *men for Peace*, hold always uniform: some kind of Wars then were holden *sacred*, and wherein they not only adventured their Estates, but even their own Persons; and these not only in a defensive way, but by way of

invasion, and many times where no need was for them to appear. Tenants in *Socage* also, in regard of their service, might plead exemption from the Wars; for if not, the Plough must stand still, and the Land thereby become poor and lean. Nevertheless, a general service of defence of the Kingdom is imposed upon all; and Husbandmen must be Soldiers, when the debate is, who shall have the Land. In such cases therefore they are *evocati ad arma*, to maintain and defend the Kingdom, but not compellable to foreign service, as the Knights were, whose service consisted much in defence of their Lord's person, in reference to the defence of the Kingdom; and many times policy of War drew the Lords into Arms abroad, to keep the Enemy further from their borders, and the *Knights* then under their Lords pay went along with them: and therefore the service of *Knighthood* is commonly called *servitium forinsecum*. Of these *Socagers* did arise, not only the body of *English Footmen* in their Armies, but the better and more wealthy sort of them found Arms of a *Knight*, as formerly hath been observed, yet always under the pay of the common Purse. And if called out of the Kingdom, they were meer *Volunteers*; for they were not called out by distress as *Knights* were, because they held not their Land by such service; but they were summoned by *Proclamation*, and probably were mustered by the high Constables in each Hundred; the Law nevertheless remaining still entire, that all must be done not only *ad fidem Domini Regis*, but also *Regni*; which was disputed and concluded by the Sword. For though Kings pretended danger to the publick oftentimes to raise the people; yet the people would give credit as they pleased. Or if the King's Title were in question, or the Peoples Liberty, yet every man took liberty to side with that party that lik'd him best; nor did the King's *Proclamation* sway much this or that way.

It is true, that precedents of those times cry up the King's power of *arraying* all Ships and Men without respect, unless of age, or corporal disability; but it will appear that no such *array* was, but in time of no less known danger from abroad to the Kingdom, than imminent; and therefore might be wrought more from the general fear of the Enemy, than from the King's command: And yet those times were always armed in neighbouring Nations, and Kings might have pretended continual cause of *arraying*. Secondly, it will no less clearly appear, that Kings used no such course, but in case of general danger to the whole Kingdom, either from foreign Invasion, as in the times of King *John*, or from intestine Broils, as in the times of *Henry* the third, and the two *Edwards* successively. And if the danger threatned only one coast, the *array* was limited only to the parts adjacent thereunto. Thirdly, it seemeth that general *arrays* were not levied by distress, till the time of *Edward* the first, and then only for the rendezvous at the next Sea-coast, and for defence against foreign Invasion; in which case all Subjects of the Kingdom are concerned by general service: otherwise it can come unto no other account than that Title *Prerogative*, and therein be charactered as a trick above the ordinary strain. Fourthly, those times brought forth no general *array* of all persons between the ages of sixteen years and sixty, that was made by distress in any case of Civil War, but only by Sheriffs summons; and in case of disobedience, by summons to appear before the King and his Council: which sheweth, that by the common Law they were not compellable or punishable. Lastly, though these *arrays* of men were sometimes at the charge of the King, and sometimes at the Subjects own charge, yet that last was out of the road-way of the Subjects liberty, as the subsequent times do fully manifest. And the like may be said of *arrays* of Ships,

Ships, which however under command of Kings for publick service, were nevertheless rigged and paid out of the publick charge. The sum of all will be, that in cases of defence from foreign Invasion, Kings had power of *array* according to the order of Law; if they exceeded that Rule, it may be more rightly said, they did what they would, than what they ought.

C H A P. LXXI.

Of the Peace.

WAR and Peace are two births by several venters, and may like the day and night succeed, but can never inherit each to other; and for that cause they may claim to belong to one Father, and that one and the same power should act in both: and yet it is no good Maxim, That he that is the chief Commander in War, ought to be the chief in the order of Peace. For it naturally befalls that War, especially that which we call *Civil War*, like some diseases in the body, does rather breed ill humours than consume them; and these must be purged by dieting the State, and constant course of Justice, unto which the rugged Waves of War have little or no affinity, if they have not enmity. Nevertheless, the wisdom of our Ancestors thought it most meet to keep their Kings in work, as well in time of Peace, as of War; and therefore as they anciently referred the principal care thereof to the Lords, who together with certain select persons in every County, did administer Justice in several *Iters* or Circuits: so when Kings had once gotten the name of being chief in civil affairs, as they had it in martial, they soon left the Lords behind them (who also were willing enough with their own ease) and had the name of doing all, notwithstanding it was done by advice of the Lords, and directory of Ministers, or Commissioners thereto deputed. And thus that Peace which formerly passed under the Titles of *Pax Domini*, *pax Vicecomitis*, which is *pax Regni*, became by eminency swallowed up in that which was called the King's Peace; and the Justices called the King's *Justices*, and himself flattered into that Title of *Fountain of Justice*, which belongeth only to him that is The Most High or Chief Law-giver.

Tacitus.

92 Hen. 3.
Marlb. c. 25.

The manner how this honourable care of the Safety and Peace of the Kingdom was employed, may be referred to a double consideration; the one in execution of Justice upon Delinquents, the other in preventing occasions of offence or delinquency, by means whereof the *publick Peace* might be endangered. The first was acted diversly according to the present sense of affairs; for what was at first done by the Princes in their Circuits, with one hundred of the Commons called *Comites*, and that done *per pagos, vicofque*, was afterwards done by *itinerant* Judges, sent from the King for the greatest matters; and by Lords in their *Leets*, Governours or chief Magistrates of Towns in their *Courts*, and Sheriffs in their *Torns*, as *Judices statim* for the ease of the people in matters of less moment. I say, I conceive it was in the *Torn*; for I suppose no emergent Court, taken up upon occasion, could by the Law draw a necessity of a sudden appearance of all above twelve years of age at the same. And for the same cause it seemeth, that one certain *Torn* every year was holden for inquiries of *Homicide*, unto which all above twelve years of age were

were to come, except *Barons, Clergy, and Women*, or otherwise all such had been bound to attendance on every *Torn*. Nevertheless, the work of the *Torns* continued not to *bear and determine*, as anciently they had done. For in *Henry the third's* time, and formerly, divers men had *Prisons* to their own use; some as *Palatines*, others as *Lords of Franchise*, and others by power and usurpation, and had the benefit of all *Fines* incident: and by this means many were *fined* that deserved it not, and some also that deserved worse. To prevent which evil, *Henry the third* took away that power of holding *Crown-pleas*: And *Edward the first* took away their power to *determine Escapes*, and left them only the power of *inquiry*, and to *certify* at the next coming of the *Justices*.

Mirror. cap. 2.
Sect. 9.

Mag. Charta.
cap. 19.

Gloucester. c. 8.
West. 1. c. 3.

But these injurious times had holden too long to be forgotten, or laid aside by such cool pursuit. Men were still ordinarily imprisoned, and so continued oftentimes, till the coming of the *Justices itinerant*. For whereas in case of *Bloodshed*, the *Writ de odio & atia* was a remedy; the other had no remedy but by procuring a *Commission of Oyer and Terminer*, which ordinarily was a cure worse than the hurt. As a remedy hereof, *Edward the first* found out the new way of making *Justices of Peace*, as may appear by the Statute at *Winton*: which Law being purposely made for the conserving of the *Peace*, providing for penalty of Crimes already committed (as well as for the suppressing of future) ordaineth, *That offences against that Law shall be presented to Justices assigned to enquire thereof*; and though these at the first might be *itinerant*, yet it soon made way to *resiant*. And before that Statute, it seemeth the King had found out the way, if that Note be true which is left revived into memory by that honourable Reporter, which relating to the sixth year of *Edward the first*, saith, *That then prima fuit institutio iusticiariorum pro pace conservanda*. And yet some semblance there is, that it was yet more ancient, even in the time of *Henry the first*, if I mistake not the sense of that clause in his Laws concerning *Vagabonds*; he ordereth that they shall be carried *Justicia quæ præest*, although the Language be not so Clerkly as to speak the sense out. Now though their Work as yet was but in trial, and they were only trusted with power of *inquiry*, yet it induced a new way wherein the *Sheriff* was not so much as intrusted to intermeddle; and which not only intermitted the course of his proceedings in such matters, but also led the way to the despoiling of the *Sheriff's Torn*, and *Lord's Leet*, of that little remainder that was left them of *Judicatory Power* in matters that were against the *Peace*, and made their *Inquisitory Power* less regardful, and eased the *Justices itinerant* of much of their Work, in regard they were speedily to certify up to the King, and so these matters should be determined in *Parliament*, according as those *Justices* were elected in *Parliament*; who as it seems were jealous of giving the power of determining those offences into any sudden hand. To sum up then the first part; as touching the punishment of offences against the *Peace*, the wheel is now in the turning, the *Leets* and *Torns* begin to be slighted, the labour of the *Justices itinerant* lessened, the *Commissions of Oyer and Terminer* disused, by the bringing in of a new Order of *Justices for the Peace* especially appointed; and the *Parliament*, as the supreme Providers, left as the reserve for the asserting and maintenance of the same; albeit that under it the power of determining much rested upon *Justices* or *Judges* that attended the King's Court, after that the *Common-pleas* were settled and confined to a certain place.

Stat. Wint.
13 Edw. II.

Coke Inst. 4.
p. 176.

Hen. I. c. 58.

Of preserving the Peace,

The preserving of the *Peace* for the future, consisted in preventing and suppressing *Riots, Routs, unlawful Assemblies*, and in apprehending and securing of such as were actors and contrivers of such designs, and other Malefactors. And herein we are to consider, 1. The *Laws*: 2. The *Means*: 3. The *executive Power*. Concerning the first, there is no question to be made, but that the power of making *Laws* for the maintenance of the *Peace*, rested in the Parliament, although endeavour possibly might be used to settle the same in the sole order of the King's own person; and therefore we find not only the assize of Arms, but generally the substance of the Statute at *Winton*, to be formerly taken up by *Proclamation* by Kings, predecessors to *Edward* the second, who first that I can find, put the same into force of a Law by Parliament, finding by experience that *Proclamations* may declare the King's Mind, but not command the People's Wills; although peradventure the thing enjoined was of ancient use, and little inferiour to Custom or Common Law. Such are the Distempers of Civil Broils, that bring up *Peace* in the rear, as a reserve when their own strength is wasted, rather than out of any natural inclination thereto. A brief recollection of the Laws herein thus ensue:

Stat. Wint.
13 Edw. 1.
cap. 1.

In case of Robbery or Felony committed, and the Delinquent be not forth-coming or discovered, the County or Hundred shall answer the damages.

Of this, more may appear from the *Norman* and *Saxon* Laws: the intent appeareth by the Law itself, to stir up the people to use all means by pursuit with *Hue and Cry*, and making inquisitions of the Fact with all speed, in Townships, Hundreds, Franchises, and Counties.

cap. 2.

Persons suspected shall not be entertained or harboured by any Inhabitant, unless he will undertake for him.

Of this also formerly, both in the *Norman* and *Saxon* Laws.

cap. 3.

Walled Towns shall keep their gates shut from Sun-set to Sun-rising. The like observed in Cities, Burroughs, and Towns, from the Feast of Ascension to Michaelmas.

M. Paris in
Addit. & post.
Adversar.

The power of the *Watch* was great: it might apprehend any Passenger and stay him all night; and if he be a suspected person, he is to be committed to the *Sheriff*; and if an escape be made, the party is to be pursued with *Hue and Cry*. These two last Chapters were in effect in *Henry* the third's time, in course, by way of the King's command by Writ, in the 36th and 37th years of his Reign, with some more particulars concerning the same.

cap. 4.

Higb-ways through every Lordship shall be kept clear on each side, by the space of 200 foot, from Hedges, Ditches, Bushes, and Underwood.

Higb-ways herein intended, are such as are from one Market-Town to another; and in such were always preserved the publick peace or safety, for the maintenance of

of Commerce, and freedom of Traffick: which is of such publick concernment, that it hath been of very ancient institution.

Every man between the age of fifteen years and forty, shall main-^{cap. 5.}tain Arms in his house, according to the ancient Assize, for the preserving of the Peace.

This Chapter brings into consideration the second thing propounded, viz. the means of preserving of the Peace, which are two; First, by *maintaining Arms*: 2. By *certifying Defaults*. In the first is to be considered the *Persons* that are to be assessed: 2. The *Arms*: 3. The *End*. The *Persons* to be assessed to Arms, are indefinitely set down, and comprehend all sorts, as well bond as free, and others; for such are the expressions in the Commission of *Henry* the third. But by the Assize of *Henry* the second, none were to be armed but *Freemen*, and they worth sixteen or ten marks in Goods at the least; yet their ages are limited: by this Law they must be between fifteen years and forty; but by the Commission in *Henry* the third's time, all between fifteen and sixty years of age were to be armed. ^{36 Hen. 3. M. Paris, post adversaria. Hoveden.} King *John* arrayed all sorts, *free, bond*, and all others that have *Arms*, or ought to have, or can carry Arms: and it seems by what hath been formerly noted, that those that were younger than their Tenure would bear them out, were accepted into service, if they would offer themselves; but by these courses they, though under one and twenty years of age, were not only accepted, but compelled to War. ^{M. Paris, An. 1213.} Under this Title, we may also touch upon the persons that were the instruments to ^{Hoveden.} array these men, or rather to arm them; and these were Justices *itinerant*, or one ^{Hen. 2. M. Paris addit.} or more Commissioners, such as the King found most meet for the service. And unto these were Commissions with instructions sent; and sometimes Writs were directed only to the Sheriffs, to take with them twelve Knights of the County, and to go into every Hundred, and call before them all such persons as by the Law ought to be assessed at Arms, and to cause them to be sworn to find and maintain Arms in such manner as by the Law they then should be, or formerly were assessed; and sometimes the establishment of Arms were set down in those *Writs*, and sometimes published by *Proclamation*. For Kings found all means little enough to prevail to bring in alteration of Arms, and of their service; which was a thing ^{M. Paris, An. 1253, & 1256.} not only troublesome, but chargeable, and whereunto they could not easily prevail to bring the *Freemen* to consent. And therefore sometimes the endeavours of Kings in such cases, did not only meet *dilationem*, but also *deletionem*, as the Historian's words are, until the way was found out to declare an establishment by Parliament, ^{M. Paris, An. 1253.} by this Statute made at *Winton*.

Now for the nature of the establishment, we are to consider, that the people of *England* were distinguished according to their Tenures, into such as held by *Knight-service*, and such as held by *Socage*; and that none but those being *Free-^{Ll. Gulielm. 58.}holders*, could be charged to find Arms, according as by the Laws of the *Norman* Conqueror may appear. The establishment of Arms for the *Knights*, were established by their *Tenures* in certainty, and therefore no need was either of Assessment or Oath to tie them to find such Arms; but all the difficulty was, for such as were not bound by other *Tenure* than as free-born Subjects, all of whom do owe to their Country defence, and so questionless had liberty to provide themselves of such Arms

LL. Ethel. 6.
cap. 16.

Huntington.
An. 1008.
LL. Canut. 97.

Arms as were by common and constant use held most advantageous against the common Enemy, and for the publick defence. And that these were put in certainty, may appear by the Law of King *William* formerly noted, and by some instances in the *Saxon* Laws anciently used; amongst others, that Law of *Ætbelstane*, *That for every Plough, every Man should find two compleat Horses*. And another Order of *Ætbeldred* nigh eighty years after, differing from it, assessed upon every eight Hides of Land, a Helmet, and a Coat of Mail: And the Historian tells us, *That a Hide is a Plough-Land, or so much Land as one Plough can keep in Tillage to the end of one whole year*. And the relief of the Noblemen of all sorts and ranks, in Horses, Helmets, Coats of Mail, Lances, Shields, and Swords; the meanest of all which degrees being called *Mediocris Tbainus*, yielding a relief equal to the Arms of a Knight, in the times whereof we now treat, viz. one Horse, one Helmet, one Coat of Mail, one Lance, one Shield, one Sword: all comprehended under *arma sua*, as if he had a certain proper Arms. And the Laws concerning the forfeiture of Arms, do in effect affirm the thing, viz. *that all men were armed*; yet probable it is, that laws were not then so often made for the enforcing this or that particular sort of Arms, in regard that till the *Normans* time this Island was troubled but seldom with any Enemies from foreign parts, that brought any new sorts of Weapons into fashion; the *Danes* and *Norwegians* being no other than an old Acquaintance of theirs. Neither were the *Saxons* as yet tamed by any Enemy, so far as to beg a Peace, albeit that the *Danes* had gotten them under. But after the *Norman* times, the *English* being somewhat over-matched in War, inclined more to Husbandry, and began to lay aside their regard of Arms; and this occasioned the Kings to make Assessments of Arms: yet having regard to the ancient course of the *Saxons*, saving that they urged the use of the Bow more than formerly was used, and thereby taught the conquered to conquer the Conquerors in future ages. Of these sorts of Assessments before this Statute at *Winton*, I find but two: the first made by *Henry* the second, and the other by *Henry* the third; which, together with that of this Statute, I parallel thus together, in their own words.

Hen. 2.	Hen. 3.		Stat. Wint.
	Lands.	Goods.	
Knights Fees.	15 Librat.	60 Marks.	15 l. Land. 40 Marks Goods.
Loricam Cassidem Clipeum Lanceam	Loricam Capellum ferri Gladium Cultellum Equum	Loricam Capellum ferri Gladium Cultellum Equum	Hauberk Chapel de fer Espee Cotel Cbival
16 Marks { Chattels. Rents.	10 Librat.	40 Marks.	10 l. Lands. 20 Marks Goods.
Halbergettum Capelletum ferri Lanceam	Halbergettum Capellum ferri Gladium Cultellum	Halbertum Capellum ferreum Gladium Cultellum	Hauberk Chapel de fer Espee Cotel
10 Marks { Chattels. Rents.	100 s	20 Marks.	100 s, Land.
Wanbais Capelletum ferri Lanceam.	Perpunctum Capellum ferreum Gladium Lanceam Cultellum	Perpunctum Capellum ferreum Gladium Cultellum	Purpoint Chapel de fer Espee Cotel
	Betwixt 5 l. and 40 s.	9 Marks.	Betwixt 5 l. & 40 s.
	Gladium Cultellum Arcum & sagit.	Gladium Arcum & sagit. Cultellum	Espee Arke & setes Cotels
	Under 40 s.	Under 9 Marks to 40 s.	Under 40 s.
	Falces Gisarmas Cultellos, &c.	Falces Gisarmas, &c.	Faulx Gisarmes Cotels
			Under 20 Marks Goods.
			Espees Cotels

See Mat. Par.
Addit. auct.
194. Selden's
Tit. Hon. fol.
688. Specil.
ad Eadmer.
p. 180. ante
91. Hic. 2
part. p. 170.

I have thus impaled these three, that the Reader may the better discern how they relate each to other, and so may the better understand the matter in the sum. And I must explain three or four words in them as they are set down, before I can bring up the conclusion; because the mistake of the sense of the words hath made some mistake in the intent of the thing, and forced the same to an unwarrantable

Lipſius de mi-
lit. Rom. l. 3.
Dialog. 6.

Tacitus.

Cluver. Germ.
P. 339. 340.

issue. *Lorica* ſignifies that piece of Armour that defends the breaſt, or forepart of the body; and ſometimes is made of plates of Iron, of which ſort I conceive thoſe of the old *Germans* were, (whereof the Hiſtorian maketh mention, *paucis loricae*, he ſaith the *Germans* had few Arms of defence of their foreparts, and fewer Helmets or Head-pieces) for otherwiſe, if they had Iron defences for their heads, they would not have been content with defences made of Leather for their fore-parts, as in the firſt rude times they might have been. Sometimes it is made of links of Iron, and commonly is called a *Coat of Mail*; but I conceive it cannot be ſo meant in the aſſeſſments of *Henry* the Second, and *Henry* the Third, becauſe that thoſe of the ſecond degree are ſaid that they ought to keep *Haubergettum*, or *Halburgellum*, or *Haubertum*; all which are but ſeveral dialects of one name, and are taken for a *Coat of Mail*: and therefore by the diverſity of names in one and the ſame aſſeſſment, I do conclude that the armour was not of one and the ſame faſhion. But it is evident, that by *Hauberck* in the aſſeſſment of the Statute at *Wint.* is meant a *Coat of Mail*, and is never taken for a Breaſt-plate or *Gorget*, as hath been taken upon truſt by ſome that build more weighty concluſions upon that weak principle, than it is able to bear: and for the truth hereof, as the word is a *French* word, ſo I appeal to all *French* Authors, and ſhall not trouble the Reader with the notation of the word, or further about the meaning thereof. In the laſt place, as great miſtake is that alſo of the word *Shapel de fer*, which is taken by ſome to betoken a *Breaſt-plate of Iron*: For the truth whereof, the Reader may conſider the Latin word *Capellum*, or *Capelletum*, and he ſhall find that it is an *Iron cap*, or an ordinary *Head-piece*: and in the Aſſize of *Henry* the Third it holds the place of *Caffis* in the Aſſize of *Henry* the Second. For the manner of all theſe, let the Reader view the Sculptures of the ſeveral *Norman* Kings, armed for the Charge, in the beginning of their ſeveral Reigns, as they are represented in *Speed's* Hiſtory. It may alſo be conceived, that there is as much miſtake of that Weapon which is called *Cultellum* or *Cotel*, whiſt they tranſlate it by the word *Knife*; for though it be true that it is one ſignification of that word, yet it appears not only by this Law, that it was a Weapon for a *Knight* in War, but in uſe at *Tornaments*, as by that Statute that forbids the uſe of a *pointed Sword*, or *pointed Cotel*, a *Battoon*, or a *Mace*, at that ſport: and therefore it may ſeem to be ſome Weapon of greater uſe, either a *Cotellax*, or ſuch-like Weapon; otherwiſe to enjoin the finding of a *Knife* to a man as an offensive Weapon againſt armed men in *Battle* would ſerve to no uſe at all.

Now concerning the difference between the ſeveral Aſſizes aforeſaid, it conſiſteth either in the number of the ſeveral degrees or ranks of thoſe that are aſſeſſed: Or ſecondly, in the manner of their valuation: Or laſtly, in the particulars of their Arms aſſeſſed upon them. As touching the degrees in *Henry* the Second's time, they were but Three, in regard that he only aſſeſſed *Free-holders*: and certainly that was the ancient Law, as by the Law of the Conqueror, and other *Saxon* Laws formerly mentioned, may appear. But *Henry* the Third taking example of King *John*, who was the firſt founder of general *arrays*, charged all but ſuch as were men of nothing; albeit, I find not that ſuch as were of the inferiour degree, were ſworn to thoſe arms, but rather allowed to have them. And though the Statute at *Wincheſter* holdeth to the ſame degrees in Lands, yet in the value of Goods there is ſome difference, in favour of them that only have ſtock and no *Freehold*. Secondly, there is ſome difference in the manner of valuation of *Lands* with *Cbatte's*; and therein the Statute at *Winton* favours the perſonal eſtates, more than *Hen. III.* and he more than *Hen. II.* and yet all of them pretend one rule of ancient cuſtom;

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believe they mean, that they had it in their eye, but not in their heart: For they would come as nigh to it as they could, and yet keep as far from it as they durst. Thirdly. as touching the difference of the Arms between these three assessments, it seems so small, as in this they are most of them all one. For wherein *Hen. 2.* leads, both *Hen. 3.* and *Edw. 1.* do imitate, saving that they add the *Horse* and *Sword*; which questionless was to be understood as a granted case, that the compleat Arms of a man could not be carried and managed without a *Horse*, nor defended without a *Sword*. As touching other alterations, it might be done upon good advice, as not being deemed meet that such as were no *Knights* but in Estate, should be armed in every respect like as the *Knights* were. And thus we have an ancient custom of maintaining Arms by every *Freeman*, for the defence of the Kingdom, first made uncertain by the avarice of Kings, and negligence of the *Freemen*, and brought into an arbitrary charge; at length reduced to a certainty, upon all sorts of Inhabitants by a Statute-Law (if so it then were) unto which every man had yielded himself bound by his own consent. But to what end is all this? I said it was for the defence of the Kingdom, and so it was in the original; and yet also for the safety of the King in order thereunto, and for the safety and maintenance of the peace of every member of the whole body. This in one lump thus will not down with some, who will have this assessment only to be for keeping of the peace against *Routs* and *Riots*, but not sufficient nor intended to be supply for War, when *Edward* the First calls for it; because *Edward* the First shall not have his power confined within the compass of a Statute, but to be at liberty of *array* as he should think meet: and it is not to be denied but the words of this Law run thus, *viz.* That the intent thereof is *for the preserving of the Peace*; but those general words will not bear the power of a restrictive sense; for certainly the *Peace* is as well preserved by providing against *War*, as against *Riots*; and against *Foreign War*, as *Intestine Mutinies*. And that the Statute intended the one, as well as the other, will appear, because it was made in relation to former precedents of *Henry* the Third; and they speak plainly that their intent was to strengthen the Kingdom against dangers from abroad. The words of the Historian are clear, that *Henry* the Third charged all that had *15 libratas terræ*, and upwards, should undertake the Arms of a Knight, *ut Anglia, sicut Italia, militia roboraretur*. And because he had threats from beyond Sea, by the defection of the *Gascoigns*, therefore he caused Writs to issue forth throughout the Kingdom, that *secundum pristinam consuetudinem*, assessment of Arms should be *secundum facultates*; and in one of Writs published by the Historian, the express assessment of *H. 3.* formerly mentioned, is particularly set down. Nor are these *Arms* thus assessed, so slight as men would pretend: for the *Arms* of the first Rank were the compleat Arms of a *Knight*, and their Estates equal thereunto; for those *15 libratæ terræ* amounted to 780 Acres of Land, as the late publisher of *Paris* his History hath it: and is very nigh the reckoning of *Henry Huntington*, who (as hath been mentioned) layeth a Helmet and Coat of Mail unto eight Hides of Land, which according to *Gervase* of *Tilbury*'s account cometh to 800 Acres, every Hide containing one hundred Acres. These therefore were better than *Hoblers*. And the succeeding Ranks found Arms also proportionable to their Estates, as considerable as the times could find for such as were of constant use, and might be supplied with other Weapons as occasion served, and as they might be of most benefit for the service.

M. Paris, fol.

916.

M. Paris, fol.

864.

Vid. post. Ad-

versaria.

M. Paris.

Cap. penult.

Furthermore, whereas it's said, that the wisdom of the Parliament might be questioned, if they intended no better provision against an Enemy than against a Thief or a Rogue; I should desire the consideration of those men, whether are those Thieves and Rogues, in Troops or Bodies, and well armed, or are they a sort of scattered Out-laws, lightly armed to fly away, when they have gotten the prey? If they were in the former posture, I pray what difference in point of difficulty of suppressing, between them and so many Enemies? and if it was discretion in the Parliament to make this provision against the one, certainly these, with the *Knight-hood* of the Kingdom, with as much discretion, will be sufficient provision against the other. But if these be looked upon in the later sense, I fear the discretion of the Parliament would have been much more questioned in arming all men that have any ability to suppress Thieves and Rogues, against which the ordinary *Watch and Ward* of the Kingdom was an ancient and approved remedy, and sufficient safe-guard. And I would fain know of these men, whether it be for the safety of *Edward* the First, or any other King, to arm the whole body of the people, especially in times of jealousy, for suppressing of Thieves and Robbers, whenas it may be done by a guard of known men in every County, with much more ease, and less charge to the people.

Lastly, whereas it is endeavoured to make this Statute but a temporary provision, and taken up for the present condition of affairs, when Thieves and Robbers went with great strength, and in multitudes: This might be, I grant, of some efficacy, if it had been *introducio novis juris*; but it being grounded upon a former Custom, the ground of that custom (which was *defence of the Kingdom*) must be the warrant of the Law; otherwise the present inconvenience might be remedied by a present Order, and needed not the help of a Law that should rest upon former Custom, or provide for future generations. Nevertheless, if all be granted, *viz.* that this Statute is but a present Order, that the *Arms* therein are too slight to resist an Enemy, and the end thereof was only to enable the Kingdom against Thieves and Robbers; yet could not *Edward* the first pretend to have any power to *assess Arms* at pleasure upon occasion of War, for the defence of the Kingdom; nor is there any precedent in story that countenanceth it, seeing *Henry* the Third, and *Henry* the Second, in their course used the rule *secundum facultates*, as had been formerly observed; and the rule foregoing tended only to *Freemen* and their Lands. Nor did King *John* disclaim the same, but pursued it; (and yet if there be any precedent or Prerogative in story, which King *John* had not, that King will be looked upon as a King of wonderment) I say, King *John* pursued it when he was in the strength of his distemper, threatened by the Pope, provoked by the *French* King now ready in the field, vexed by his people; and himself scarce himself, summons to defend himself, themselves, and the Kingdom of *England*, all men that ought to have Arms, or may have Arms, and such as have no Arms, and yet *arma habere possint*, let them also come *ad capiendum solidatas nostras*; and accordingly there came a vast number, not only of the armed men, but of the unarmed multitude, who afterward were sent to their own home when victuals failed. Hitherto therefore King *John*, not above three years before his death, held himself to the assessment to Arms only of such as had Lands; and at this time of exigency, others unarmed were summoned to take Arms from the King with their pay, or otherwise they must fight without Weapons.

I am now come to the last general point, which concerneth the executive power of matters concerning the peace within this Law, touching which the Statute enforceth

enforceth this, That *Constables* in every Hundred and Francise shall have the view of Arms, and shall present defaults against the Statute of Justices assigned, who shall certify the same to the King in every Parliament, and the King shall provide remedy. Whereby it seemeth manifest, that hitherto no Law or Custom was made against any for default of Arms, but only such as held by that Tenure: and therefore they had a shift to cause them to swear to maintain Arms, and so might proceed upon defaults, as in case of perjury; and that the Parliament was still lothe to set any certain rule for penalty, and absolutely declined it, and left it under a general *periculo incumbente*, which it is likely men would rather eschew by obedience, than adventure upon out of a daring spirit, unless their case was very clear, within the mercy of common reason. And therefore such cases were left to special order of the Parliament, rather than they would deliver such a rod as *determining power* was, over into any uncertain hand whatever. It is very true, that by the opinion of some, this also hath been controverted, as if all the *executive power* had been turned out of the Parliament's Order, into the *directory* of Edward the First: which thing reacheth far; for then in order thereunto, the whole *Militia* of the Kingdom must have been under his safe command. And whether it ever entred into the conceit of that King I know not, but somewhat like thereunto, is not obscurely urged to nourish and suggest such a kind of notion, and so derive it unto his Successors, upon the words of a Statute *de defensione portandi armorum*, the *English* whereof I shall render out of the French as followeth:

It belongeth to Us *, (*viz.* Edw. I.) *and from Us by Our Royal Seigniorie, to defend* * (*i. e.* It is force of Arms, and all other force against Our peace, at all times that We shall please; ^{our bounden Duty.} *and to punish according to the Laws and Usages of this Realm, such as shall oppose; and to this they* (*viz.* Lords and Commons) *are bound Us to aid as their good Lord, always when need be.*

Two things are concurrent with this, which is the body of the Statute, if such it be. The one is the Preface, or the Occasion: And the second is the Conclusion upon the whole body of the same. The Preface first sets down the inscription or direction of the Law; not to the People, but to the Justices of his Bench; and so it is in nature of a *Writ* or Declaration sent unto his Judges. Then it sets down the Occasion, which was a debate between Edw. I. and his Lords, with a Treaty which was had before certain persons deputed thereto: and it was accorded that at the next Parliament, Order shall be taken by common consent of the King, the Prelates, Earls, and Barons, that in all Parliaments, Treaties, and other Assemblies which shall be had in the Kingdom of *England* for ever after, all men shall come thereto *without force*, and *without arms*, well and peaceably; and thence it recites, that the said meeting at Parliament was had, and that there the Prelates, Earls, Barons, and Commonalty being assembled to advise upon this matter; *nous eiont dit*, saith one Copy, and *nous eions dit*, saith another Copy: so as whether this was the Declaration of the King unto the Parliament, or of the Parliament to the King, is one doubt, and a principal one it is in such a case as this. Then the conclusion of all is, that the King commandeth these things shall be read before the Justices in the Bench, and there enrolled; and this is dated the 30th of *October* in the seventh year of his Reign, which was *Ann.* 1279. So as if it were the Declaration of the King, then it implieth as if it were not very well accepted of the Parliament; and there-

therefore the King would have it rest upon Record in nature of a Claim or *Protestando*, for saving the Prerogative of the Crown. But if it were the Declaration of the Parliament, the King held it so precious a flower, that fearing it should fade, set it in a private Garden of his own, that it might be more carefully nursed against the blast of Time; as if the Parliament had not assented thereto, or (if they did) meant not to hold it forth to the world for future times to be a constant rule, but only by way of concession, to ease themselves of the present difficulty, in making a Law against wearing of Armour in ordinary civil affairs, and so referred it to the King's care to provide against emergent breach of the peace, as an expedient for the present inconveniencies in affairs. And it will well suit with the posture of affairs then in course: for the *Welsh* Wars were now intermitted, and a quiet of three years ensued; in the midst of which, Soldiers having liberty to do nothing (and that is next to naught) but recreate themselves, used their wonted guise, as if they were not dressed that day that they were not armed; not fit for counsel, unless (as their Ancestors) with Weapons in their hands; nor worthy of the presence of a King under other notion, than as a General in the field, and themselves as Commanders that are never *a-la-mode* but when all in Iron and Steel. I say, to make a Law that must suddenly bind men from riding or being armed, when no man thought himself safe otherwise, was in effect to expose their bare necks to the next turn of the Sword of a King that they did not over-much trust, and the less in regard he trusted not them. I do not wonder therefore if the Parliament liked not the work, but left it to the King to provide for the keeping off breaches of the Peace, and promised their assistance therein.

Lastly, supposing all that is or can be supposed, viz. that the Parliament had given up the power of the *Militia* unto *Edward* the First; yet it was not to all intents, nor did it continue: for besides the Statute of *Tournaments*, which sheweth plainly that the ordering of Armour was in the power of the Parliament, and which in all probability was made after that Law last before-mentioned; the Statute at *Winton*, made after this Law nigh six years space, ordereth the use of the *Trained-bands* in maintaining the peace; and reserveth the penalties to themselves for any default committed against the said Act. And therefore, notwithstanding any thing that yet appeareth to me out of any Law or History, the chief Moderatorship of War and Peace, within the Realm of *England* resteth hitherto upon the Parliament next unto God; and in the King no otherwise, than in order to the Publick, the rule whereof can be determined by no other Judge than that which can be intended to have no other respect than the publick good, and which is the Abridgement of the large Volume of the Kingdom.

A

SUMMARY CONCLUSION.

AND thus have I brought the shape of the *English* Government (rude as it is) from the first off-spring of the *Saxons*, through the rough Waves of the *Danish* Tempests, the Rocks of *Norman* invasion, and of the Quick-sands of Arbitrary Government under Popes and Kings, to the Haven: much defaced it is, I confess, by the rage of time, and yet retaineth the original likeness in proportion.

Kings first (about the *Norman* times) joining with the Lords for their joint interest above the ordinary pitch, had mounted each other too high to be Lords over *Free-men*. Then by flattering of the *Free-men* into their designs, hovered above them all; but not being able to maintain their pitch so long as the Lords held together, stooped for a party amongst them, and soon obtained their desire. For some Lords (more ambitious than others, and these again more popular than them) seek several interests. And thus Kings (aided by their party to a Supremacy which they were never born to; and raised by them into a preheminance above their Peers, which neither Law nor Custom ever gave them) are of Moderators in the Council of Lords, become Moderators of those Councils; and so they obtained all that the Lords had, but no more. For though both they and the Lords abused their power over the *Free-men* by extortion and oppression, as Lords over Tenants; yet could they never prevail over them as free-born Subjects, to gain their consent to give their Right, or the Law, up to the King's beck: but still the Law remained arbiter both of King and People, and the Parliament supreme Expounder and Judge both of it and them. For other argument hereof there will be little need (besides what hath formerly appeared) than what we find in *Bracton*, who wrote in the time of Henry the Third, to this effect: *The King hath Superiours, viz. God, and the Law*

Bracton, l. 2.
cap. 16.

by which he is made King, also his Court, viz. the Earls and Barons: Earls (according to their name *Comites*) are the King's Associates, and he that hath an Associate hath a Master; and therefore if the King be unbridled, or (which is all one) without Law, they ought to bridle him, unless they will be unbridled as the King, and then the Commons may cry, Lord Jesus, &c. This was the judgment of that famous Lawyer

Ante 138.

of the state of an *English* King, in Henry the Third's time. I shall add hereto a concurrent testimony of a Lawyer also in Edward the First's time. *Although* (saith he) the King ought to have no equal in the Land; yet because the King nor his Commissioners (in case where the King intrencheth upon the right of any of his Subjects) can be both Judge and Party, the King by right ought to have Companions, to hear and determine in Parliament all Writs and Complaints of wrongs done by the King, the Queen, or their Children, and of those wrongs especially, whereof otherwise common right cannot be had. Nor is this the opinion only of Lawyers, but it is the Law itself unto which the Royal assent was added, and the same sealed with an Oath in the

Mirror. Just.
p. 9.

Edw. 2.

solemn

Remonst. Par-
liament, no-
vem. 1. 2.
An. 1642.

solemn stipulation made by Kings at their Coronation, with the people then present, in the name of the whole body : the sum whereof is wont to be propounded to the King in this manner, though in a different Language.

1. Will you grant and keep, and by your Oath confirm to the People of *England* the Laws and Customs to them granted by the ancient Kings of *England*, your righteous and godly Predecessors ; and especially to the Clergy and People, by the glorious King *St. Edward* your Predecessor ?

The King's Answer : *I do them grant and promise.*

2. Will you keep to God and the Church, and the Clergy, and the People, Peace and Concord sincerely according to your power ?

The King's Answer : *I will do it.*

3. Do you grant to hold and keep the Laws and rightful Customs, * which the Commonalty of your Realm shall have chosen, and to maintain and enforce them to the honour of God after your power ?

* *Quas Fulgas
eligerit, which
the People
shall chuse.*

The King's Answer : *I this do grant and promise.*

In few words, the King promised to keep the Laws already made, the Peace of his Kingdom, and the Laws to be agreed upon by the Commonalty : the same in substance with that of *Henry* the First, *William* the Conqueror, the *Danish* and *Saxon* Kings formerly had, and in the foregoing discourse observed. And thus is he led to the Throne in a Chain of Gold, a serious memorial of the King's duty as he is a Man, and a glorious ornament to him as a King. If then the King be under the Law in case of direction, as by stipulation he is bound ; if he be likewise under

der the Law in case of transgression, to be judged by his *Comites* or *Peers*: Hitherto certainly an *English* King is but *Primas inter omnes*, and not *supra totum*; and if at any time he skipped higher, he afterwards fell lower: for it was the lot of these times to have Lords that were bent to work the people to regard their own Liberties, in which the Lords had first wrapped up their own Claims. Thus come the counsels of such as have been notoriously exorbitant to be scanned; and to bring these into frame, all run out of frame; the *Barons Wars* arise, and thrive according as interests do concenter more or less: the issue is like that of a drawn battle, wherein he that continueth last in the field, is glad to be gone away, and so the Title is left to be tried upon the next advantage that shall arise.

Yet had Kings gotten one step forwards to their design, which was, in that they now had to deal with a divided *Baronage*. It was the birth of Ambition, and it was nourished by the same milk; for those that side with the King are become *Magnificoes* next to the King's person, and the sole managers of all the great affairs of State, concurrent with their own designs under-board. But the other Lords are in account rural, standing further off; and looking on at a distance, are laid away as superfluous. And as they themselves are out of the game of great men, so grow they mindless of their interest in the great affairs: yet of these there is diversity; for some sport themselves in their condition; others observe the irregular motions of those above, and watch their own time.

This was the first advance of that society, which was afterwards called the *Privy-Council*; being a company of choice men according to the King's bent, unto whom the consideration of all the weighty affairs of the Kingdom is committed; but nothing can be concluded without the King's *Fiat*, which regularly should follow upon the premises, according to the major vote; but more ordinarily suited with that which best suited with his pleasure. And now are Parliaments looked on as fatal, or at the best but as heavy dull Debates, and inconvenient both for speed and secrecy; which indeed are advantages for weak and unwarrantable councils; but such as are well-grounded upon truth, and strength of reason of state, are not afraid to behold the clearest noon-day; and prevail neither by speed nor secrecy, but by the power of uncontrolled Reason fetcht from truth itself. The *Grand Council* of Lords also are now no less burthensome: For though they were not able to prevail against the private designs of an arbitrary Supremacy, yet do they hinder the progress, tell tales to the people, and blot the names of those that are of that aspiring humour; which once done, like that of *Sisyphus*, they have no other end of their labour than their toil.

Thus perished that ancient and rightly honourable *Grand Council of Lords*, having first laid aside the publick, then lost unity, and lastly themselves; besides the extreme danger of the whole body. For the sense of State once contracted into a *Privy Council*, is soon recontracted into a *Cabinet-Council*, and last of all into a *Favourite* or *two*; which many times brings damage to the publick, and both themselves and Kings into extreme *præcipices*; partly for want of maturity, but principally through the providence of God over-ruling irregular courses to the hurt of such as walk in them.

Nor were the *Clergy* idle in this bustle of affairs, although not very well employed; for it is not to be imagined but that these private prizes plaid between

The Conclusion.

the Lords, and Commons, and King, laid each other open to the aim of a foreign pretention, whilst they lay at their close guard one against another. And this made an Ecclesiastical Power to grow upon the Civil, like the Ivy upon the Oak, from being Servants to Friends, and thence *Lords of Lords*, and *Kings of Kings*. By the first putting forth, it might seem to be a spiritual Kingdom; but in the blossom, which now is come to some lustre, it is evident to be nothing but a Temporal Monarchy over the Consciences of Men; and so like Cuckows, laying their Eggs in nests that are none of their own, they have their brood brought up at the publick charge. Nevertheless, this their Monarchy was as yet beyond their reach; it was Prelacy that they laboured for, pretending to the Pope's use, but in order to themselves. The Cripple espied their halting, and made them soon tread after his pace; he is content they should be Prelates without measure, within their several Diocesses and Provinces, so as he may be the sole *Prælatissimo* beyond all comparifon. And undoubtedly thus had been before these times destroyed the very principles of the Church-Government of this Kingdom, but that two things prejudiced the work: The one, that the Papalty was a foreign Power; and other, that as yet the Pope was entangled with the power of Councils, if he did not stoop thereunto. The first of these two, was the most deadly *Herb* in the *Pottage*, and made it so unsavory, that it could never be digested in this Kingdom: For Kings looking upon this as an intrenchment upon their Percogative, and the People also as an intrenchment upon their Liberties, both or one of them were ever upon the guard, to keep out that which was without, and which they saw would be ruled neither by Law nor Counsel. And therefore though both Kings and People yielded much unto the importunity of these men, and gave them many privileges whereby they became great, yet was their greatness dependant upon the Law of the Land and Vote of Parliament; and though they had the more power, they nevertheless were not one jot the more absolute, but still the Law kept above their top. I deny not but they in their practice exceeded the rule often, and lifted themselves above their rank; yet it is as well to be granted, that they could never make Law to bind the Churchmen, much less the Laity, but by conjunction of the Grand Council both for Church and Common-wealth affairs; nor could they execute any Law in that case that concerned the Liberty or Propriety of either, but in a Synodical way, or as deputed by the Parliament in that manner. And therefore I must conclude, that in these times whereof we treat, the principles of Church-Government, so far as warranted by Law, were in their nature *Presbyterial*; that is, both in making Laws and executing them, Bishops and Archbishops were never trusted with the sole administration of them, but in and by consent of Synods, in which the Clergy and Laity ought to have their joint vote. And all power more, or contrary hereto, was at the best a usurpation coloured by practice; which was easily attained, when there was a perpetual Moderatorship resting in the Bishop, and over all the Pope; the *King, Lords, and Commons* in the mean while being buried in pursuit of several interests elsewhere.

To make all semblable, the *Freemen* met with the sad influence of these distempers, as well from the King and Lords, as the Clergy. Kings to save their own stake from the Pope, remitted of that protection which they owed to their Subjects,

jects, and let in upon them a flood of oppressions and extortions from the *Romish* and *English* Clergy, and so like a little ship cast out a Barrel for the Whale to pursue, till it gets away: But this changed no right. The Lords by their parties shattered them asunder, and dismembered their body by intestine broils. The Clergy more craftily making some of them free Denizens of the *Roman* See, and taking them into their protection, whilst others of the *Free-men* at a distance, were exposed as a prey to the continual assaults of those devouring times: All these conspired together to deface and destroy that ancient and goodly bond of Brotherhood, the Law of *Decenners*, by which the *Free-men*, formerly holden together like Cement in a strong Wall, are now left like a heap of loose stones, or so many single men, scarcely escaping with their skin of Liberties, and those invaded by many projects, and shifts in Government of State-affairs. So must I leave them untill some happy hand shall work their repair, both for time and manner, as it shall please *that great and wise Master-builder of the World*.

The End of the First Part.

The Carpenter.

I shall please that great and wise Master-builder of the World,
 until some happy hand shall work their repair, both for time and manner, as
 many projects, and shifts in Government of State-affairs. So must I leave them
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The End of the First Part.

PREFACE
THE
SECOND PART,

Or a CONTINUATION of the
Historical and Political Discourse

OF THE
LAWS and GOVERNMENT
OF
ENGLAND.

VIZ.

From the Beginning of the Reign of King EDWARD III.
until the End of the Reign of Queen ELIZABETH.

To which is Prefix'd,

A Vindication of the Antient Way of Parliaments
in *England*.

THE
SECOND PART,

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Historical and Political Discourses

OF THE

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ENGLAND

VIZ

From the Beginning of the Reign of King Edward III.
until the End of the Reign of Queen Elizabeth.

The whole is Prefixed

A Vindication of the Ancient Way of Translating
in England.

A

PREFACE or INTRODUCTION
TO THIS
SECOND PART;

BEING

A VINDICATION of the ANTIENT WAY of PARLIAMENTS
in *England*.

THE *more Words, the more Faults*, is a divine Maxim, that hath put a stop to the publishing of this Second Part for some time: but observing the ordinary humour still drawing off, and passing a harsher Censure upon my Intentions in my First Part than I expected; I do proceed to fulfil my course, that if Censure will be, it may be upon better grounds, when the whole matter is before. Herein I shall once more mind, that I meddle not with the Theological Right of Kings, or other Powers, but with the Civil Right in Fact now in hand. And because some mens Pens of late have ranged into a denial of the *Commons* ancient Right in the *Legislative* Power; and others, even to adnul the Right both of *Lords* and *Commons* therein, resolving all such power into that one principle of a King, *Quicquid libet, licet*, so making the breach much wider than at the beginning; I shall intend my course against both. As touching the *Commons* Right, jointly with the *Lords*, it will be the main end of the whole; but as touching the *Commons* Right, in competition with the *Lords*, I will first endeavour to remove out of the way what I find published in a late Tractate concerning that matter, and so proceed upon the whole.

The subject of that Discourse consisteth of three parts; one to prove that the ancient Parliaments, before the thirteenth Century, consisted only of those whom we now call the *House of Lords*; the other, that both the *Legislative* and *Judicial* Power of the Parliament rested wholly in them. Lastly, that *Knights, Citizens*, and *Burgeses* of Parliament, or the *House of Commons*, were not known nor heard of till punier times than these. This last will be granted, *viz.* That their several Titles of *Knights, Citizens*, and *Burgeses*, were not known in Parliament till of latter times: Nevertheless, it will be insisted upon, that the *Commons* were then there. The second will be granted but in part, *viz.* That the *Lords* had much power in Parliament in point of *Jurisdiction*, but neither the sole nor whole.

The first is absolutely denied, neither is the same proved by any one instance or pregnant ground in all that Book, and therefore not clearly demonstrated by *Histories* and *Records* beyond contradiction, as the Title-page of that Book doth hold forth to the World. First, because not one instance in all that Book is exclusive to the *Commons*; and so the whole Argument of the Discourse will conclude, *Ab Autoritate Negativa*, which is no Argument in human testimony at all.

Secondly,

A Vindication of the Antient Way

Secondly, The greatest number of instances in that Book, are by him supposed to concern Parliaments, or General Councils of this Nation, holden by the *Representative* thereof; whereas indeed they were either but *Synodical* Conventions for Church-matters, whereunto the poor *Commons* (he well knoweth) might not come, unless in danger of the *Canons* dint; or if they did, yet had no other work there, than to hear, learn, and receive Laws from the *Ecclesiasticks*. And the *Lords* themselves, though present, yet under no other Notion were they, than as *Counsel* to the King, whom they could not cast out of their *Council*, till after-ages, though they often endeavoured it.

Thirdly, The Author of that *Treatise* also well knoweth, that *Kings* usually made Grants and Infeodations by advice of the *Lords*, without the aid of the Parliament: And it is no less true, that *Kings* with the *Lords*, did in their several Ages exercise ordinarily *Jurisdiction*, in cases of *distributive* Justice; especially after the *Norman* entrance: For the step was easy, from being Commanders in War, to be *Lords* in Peace; but hard to lay down that power at the Foot of *Justice*, which they had usurped in the rude times of the Sword, when men labour for Life rather than Liberty; and no less difficult to make a difference between their deportment in commanding of Soldiers, and governing of Countrymen; till Peace by continuance had reduced them to a little more sobriety. Nor doth it seem irrational, that private differences between Party and Party, should be determined in a more private way, than to trouble the whole *Representative* of the Kingdom with matters of so mean concernment. If then those *Councils* mentioned by the Author, which concern the King's Grants, and Infeodations, and matters of Judicature, be taken from the rest of the Precedents, brought by him, to maintain the thing aimed at; I suppose scarce one Stone will be left for a Foundation to such a glorying Structure, as is pretended in the Title-page of that Book: And yet I deny not, but where such occasions have befallen, the Parliament sitting, it hath closed with them, as things taken up by the way.

Fourthly, It may be that the Author hath also observed, that all the Records of Antiquity passed through (if not from) the hands of the Clergy only; and they might think it sufficient for them to honour their Writings with the great Titles of Men of Dignity in the Church and Commonwealth, omitting the *Commons*, as not worthy of mention; and yet they might be there then present, as it will appear they were, in some of the particular instances ensuing, to which we come now in a more punctual consideration.

The first of these, by his own words, appears to be a *Churchmote*, or *Synod*; it was in the year 673, called by the Archbishop, who had no more power to summon a Parliament, than the Author himself hath: And the several Conclusions made therein, do all shew that the *People* had no work there, as may appear in the several Relations thereof made by *Matthew Westminster*, and Sir *Henry Spelman*, an Author that he makes much use of, and therefore I shall be bold to make the best use of him that I can likewise, in vindicating the truth of the point in hand: For, whatever this *Council* was, it is the less material, seeing the same Author

recites

Of Parliaments in England,

recites a Precedent of *Ætbelbert*, within six years after *Austin's* entry into this Island, which was long before this *Council*, which bringeth on the Van of all the rest of the Opponent's Instances; which King called a *Council*, stiled, *Commune Concilium tam Cleri quam Populi*: and in the conclusion of the same, a Law is made upon the like occasion, *Si Rex Populum convocaverit, &c.* In both which it is evident, that in those times there were *Councils* holden by the *People*, as well as by the *Magnates* or *Optimates*. Pag. 126.

His next instance is in the year 694, which is of a *Council* holden by the *Great Men*, but no mention of the *Commons*; and this he will have to be a *Parliament*, albeit, that he might have found both *Abbates*, or *Women*, and *Presbyters*, to be Members of that Assembly, and (for default of better) attested the Conclusions of the same, notwithstanding the Canon, *Nemo Militans Deo, &c.* But I must also mind him, that the same Author reciteth a *Council* holden by King *Ina*, *Suasum omnium Aldermannorum, & Seniorum & Sapientum Regni*: and it is very probable, that all the *Wise Men* of the Kingdom were not included within the *Lordly* Dignity.

The third instance can have no better success, unless he will have the Pope to be allowed power to call a *Parliament*, or allow the Archbishop power to do that service by the Pope's command; for by that Authority this (whatever it be) was called, if we give credit to the Relations of Sir *Henry Spelman*; who also reciteth another *Council* within three leaves foregoing this, called by *Withered* at *Barkhamsted*, unto which the *Clergy* were summoned, *Qui cum viris utique militaribus communi omnium assensu has leges decrevere*: So as it seemeth in those times *Soldiers* or *Knights* were in the Common Council, as well as other *Great Men*. Conc. l. Brit. Pag. 212. Ibid. p. 194.

In the next place, he bringeth in a *Council* holden in the year 747, which (if the Archbishop were then therein President, as it is said, in the presence of the King) was no *Parliament*, but a *Church-mote*; and all the conclusions in the same do testify no less, they being every one concerning Ecclesiastical matters. Ibid. p. 242.

And furthermore, before this time, the Author out of whom he citeth this *Council*, mentioneth another *Council* holden by *Ina* the *Saxon* King, in the presence of the Bishops, Princes, Lords, Earls, and all the *wise old Men* and *People* of the Kingdom, all of them concluding of the inter-marriage between the *Britons*, *Picts*, and *Saxons*, which formerly, as it seemeth, was not allowed. And the same King by his Charter, mentioned by the same Penman, noteth that his endowment of the Monastery of *Glastenbury* was made, not only in the presence of the *Great Men*, but, *Cum præsentia populationis*; and he saith, that *Omnes confirmaverunt*: which I do not mention as a work necessary to be done by the *Parliament*, yet such an one as was holden expedient as the case then stood. Pag. 219.

Forty years after, he meeteth with another *Council*, which he supposeth to be a *Parliament* also, but was none, unless he will allow the Pope's Legate power to summon a *Parliament*. It was holden in the year 787; and had he duly considered the return made by the Pope's Legate of the *Acts* of that *Council*, which is also published by the same Author, he might have found, that the Legate saith, *That they were propounded in publick Council, before the King, Archbishop, and all the Bishops and Abbots of the Kingdom, Senators, Dukes, or Captains, and People of the Land, and they all consented to keep the same.* Pag. 392.

F f

Then

A Vindication of the ancient Way

Then he brings in a *Council* holden in the year 792, which he would never have set down in the List of *Parliaments*, if he had considered how improper it is to construe *Provinciale tenuit Concilium*, for a *Parliament*; and therefore I shall need no further to trouble the Reader therewith.

The two next are supposed to be but one and the same; and it is said to be holden Anno 794, before nine Kings, fifteen Bishops, twenty Dukes, &c. which for aught appears, may comprehend all *England* and *Scotland*; and is no *Parliament* of one Nation, but a party of divers Nations, for some great matter no doubt, yet nothing in particular mentioned, but the solemn laying the Foundation of the Monastery of *Saint Albans*.

What manner of *Council* the next was, appeareth not, and therefore nothing can be concluded therefrom, but that it was holden in the year 797.

Pag. 321.

That *Council* which is next produced, was in the year 800, and is called in great Letters, *Concilium Provinciale*, which he cannot grammatically construe to be a *Parliament*; yet in the Preface it is said, that there were *Viri cujuscunque dignitatis*; and the King in his Letters to the Pope, saith concerning it, *Visum est cunctis gentis Nostrae sapientibus*; so as it seemeth by this, and other Examples of this nature, that though the *Church-motes* invented the particular conclusions, yet it was left to the *Wittagenmote* to judge and conclude them.

Concil. Brit.
Pag. 318.

There can be no question, but the next three Precedents brought by the Opponent were all of them *Church-motes*: For the first of them, which is said to be holden in the year 816, is called a *Synod*, and both Priests and Deacons were there present, which are no Members of his *Parliament*, consisting only of the *House of Lords*; and they all of them did *pariter tractare de necessariis & utilitatibus Ecclesiarum*. The second of them is called a *Synodal Council*, holden Anno 822, and yet there were then present *Omnium dignitatum Optimates*; which cannot be understood only of those of the *House of Lords*, because they ought all to be personally present, and therefore there is no *Optimacy* amongst them. The last of these three is called *Synodale Conciliabulum*, a petty *Synod*, in great Letters: and besides, there were with the Bishops and Abbots many wise Men; and in all these respects it cannot be a *Parliament* only of the great Lords.

Concil. Brit.
Pag. 334.

The next *Council* said to be holden in the year 823, cannot also be called properly a *Parliament*, but only a consultation between two Kings and their *Council*, to prevent the invasion of the *Danes*; and the attests of the King's Chaplain and his Scribe, do shew also that they were not all Members of the *House of Lords*.

The *Council* cited by the Opponent in the next place, was holden Anno 838, being only in nature of a *Council* for Law, or *Judicature*, to determine the validity of the King's Grant made to the Church of *Canterbury*; which is no proper work for a *Parliament*, unless it befall during the sitting of the same.

The next is but a bare title of a *Council*, supposed to be holden Anno 850, and not worth its room; for it neither sheweth whether any thing was concluded, nor what the Conclusions were.

The work of the next *Council*, alledged to be holden Anno 851, was to confirm the Charter of the Monastery of *Croyland*, and to determine concerning affairs belonging to the *Mercians*; and if it had been a *Parliament* for that people, it might be worthy of enquiry how regularly the Archbishop of *Canterbury*, and the Bishop

Bishop of London, and the Embassadors from the *West-Saxons*, could sit amongst them, and attest the Conclusions therein made, as well as the proper Members of that Nation.

He cometh in the next place to a *Council* holden in the year 855, which is more likely to be a *Parliament* than most of them formerly mentioned, if the Tithes of all *England* were therein given to the Church; but hereof I have set down my opinion in the former part of the Discourse. And though it be true, that no *Knights* and *Burgeses* are therein mentioned, as the Opponent observeth out of the Title; yet if the body of the Laws be duly considered, towards the Conclusion thereof it will appear, that there was present *Fidelium infinita multitudo, qui omnes regium Chirographum laudaverunt, Dignitates vero sua nomina subscripserunt*. And yet the *Wittagenmotes* in these times began to be rare, being continually interrupted by the invasions of the *Danes*. Concil. Brit. Pag. 350.

The three next *Councils*, alledged to be in the years 930, 944, 948, were doubtless of inferiour value, as the matters therein concluded were of inferiour regard, being such as concern the passing of the King's Grants, Infeodations and Confirmations.

The *Council* mentioned to be in the year 965, is supposed to be one and the same with the next foregoing, by Sir Henry Spelman; which calls itself a *General Council*, not by reason of the general confluence of the *Lords* and *Laity*, but because all the Bishops of *England* did then meet. The *Primi* and *Primates* were there; who these were, is not mentioned, but it is evident that the King of *Scots* was there, and that both he, and divers that are called *Ministri Regis*, attested the Conclusions. It will be difficult to make out how these should be Members of the *House of Lords*, and more difficult to shew a reason why in the attesting of the Acts of these *Councils*, which the Opponent calls *Parliaments*, we find so few of the *Laity*, that scarce twelve are mentioned in any one of them, and those to descend so low as the *Ministri Regis*, to make up the number. Concil. Brit. Pag. 480.

Five more of these instances remain, before the coming of the *Normans*.

The first of which was in the 975, and in a time when no *Parliament*, according to the Opponent's principles, could sit; for it was an *Inter-regnum*. Concil. Brit. Pag. 490.

The two next were only *Synods* to determine the difference between the *Regulars* and the *Seculars*, in the King's absence, by reason that he was under age; and they are said to be in the years 977 and 1009. But it is not within the compass of my matter to debate their dates.

The last two were Meetings or Courts of *Judicature*, to determine the Crime of *Treason*; which every one knows is determinable by inferiour Courts before the high Steward or Judges, and therefore not so peculiar to a *Parliament*, as to be made an Argument of its existence. And thus are we at an end of all the instances brought by the Opponent to prove that *Parliaments* before the *Norman times* consisted of those whom we now call the *House of Lords*. All which I shall shut up with two other Notes taken out of the Book of *Councils*, published by Sir Henry Spelman.

The first of which concerneth a Grant made by *Canutus*, of an exemption to the Abbey of *Bury Saint Edmunds*, in a Council wherein were present Archbishops, Bishops, Abbots, Dukes, Earls, *Cum quamplurimis gregariis militibus, cum populi multitudine copiosa votis regiis unanimiter consentientes*. The other taken out of the *Confessor's* Laws, which tells us, that Tythes were granted to the Church, Pag. 534. Pag. 621.

A Vindication of the ancient Way

à Rege, Baronibus, & Populo. And thus I shall leave these Testimonies to debate with one another, whilst the Reader may judge as seemeth most equal to himself.

Being thus come to the *Norman* times, and those ensuing; I shall more summarily proceed with the particulars concerning them, because they were times of Force, and can give little or no evidence against the Customs rightly settled in the *Saxon* times, which I have more particularly insisted upon, that the original Constitution of this Government may the better appear. Now for the more speedy manifesting of the truth in the particulars following, I shall pre-advise the Reader in three particulars.

First, that the *Church-motes* grew more in Power and Honour by the aid of the *Normans* Law, refusing the concurrence and personal presence of Kings, whom at length they excluded from their *Councils* with all his *Nobles*; and therefore it is the less wonder, if we hear but little of the *Commons* joining with them.

Secondly, That the *Norman* way of Government grew more *Aristocratical* than the *Saxon*, making the *Lords* the chief Instruments of keeping *Kings* above, and *People* underneath; and thus we meet with much noise of meetings between the *King* and *Lords*, and little concerning the grand meetings of the *Kings*, and the *Representative* of the *People*; although some foot-steps we find even of them also. For the *Kings* were mistaken in the *Lords*, who meant nothing less than to serve them with the *People's* Liberties, together with their own, which they saw wrapped up in the gross.

Thirdly, By this means the *Councils* of the *King* and *Lords* grew potent, not only for advice in particular occasions, but in matters of Judicature, and declaring of Law, ordering of Process in Courts of Pleas; which in the first framing were the works of *wise* and *learned Men*, but being once settled, become part of the *Liberties* of every *Freeman*. And it is not to be doubted but these *Councils* of *Lords* did outreach into things too great for them to manage, and kept the *Commons* out of possession of their right, during the present heat of their ruffling condition; yet all this while could not take absolute possession of their *Legislative Power*.

I now come to the remainder of the particular instances produced by the Opponent, which I shall reduce into several *Categories*, for the more clear satisfaction to the Reader, with less tediousness.

First, It cannot be denied but the *Council of Lords* gave *advice* to Kings in cases of particular emergency; nor is it incongruous to the course of Government, even to this day; nor is it meet that the *Parliament* should be troubled with every such occasion: and therefore the giving of *advice*, to *William* the Conqueror, what course he should take to settle the Laws of *England* according to the instances in *Councils* holden *An. 1060*, and *1070*, and to gain favour of the great men, according to that in *An. 1106*, and in the manner of endowment of the *Abbey of Battel*, as in pag. 25, of the Opponent's Discourse: and what to do upon reading of the *Pope's Letter*, according to that in *An. 1114*. And whether the *Pope's Legate* should be admitted, as in pag. 18. And how *King Stephen* and *Henry* shall come to an Agreement, as *An. 1153*. And how to execute Laws by Judges and Justices Itine-

rant,

rant, as *Anno 1176*. And touching the manner of ingaging for a Voyage by Croisado to Jerusalem, *Anno 1189*. And to give an answer to Embassadors of a Foreign Prince, pag. 25. And how King John shall conclude a Peace with the Pope, *Anno 1213*. Where nevertheless, *Matth. Paris* saith, was *Turba multa nimis*. [Pag. 23.] say, all these might well be done by a Council of Lords, and not in any posture of a Parliament; albeit that in none of all these doth any thing appear, but that the Commons might be present in every one, or many of them all.

Secondly, as touching Judicature, the Lords had much power therein, even in the Saxon times, having better opportunities for Knowledge and Learning, especially joined with the Clergy, than the Commons in those times of deep darkness, wherein even the Clergy wanted not their share, as in the first part of the Discourse I have already observed. Whatsoever then might be done by the Judges in ordinary Courts of Judicature, is inferiour to the regard of the Parliament; and therefore the Plea between the Archbishop and Ethelstan concerning Land, instanced *Anno 1070*. And between Lanfrank and Odo, *Anno 1071*. And between the King and Anselme, pag. 15, 16. And the determining of the Treason of John (afterwards King) against his Lord King Richard, pag. 23. And the difference concerning the title of a Barony between Mowbray and Scotvile, pag. 25. And giving of security of good behaviour by William Brawse to King John, pag. 26. All these might well be determined before the Lords, and yet the Parliament might be then sitting; as the contrary to either doth not appear, and therefore can these form no demonstrative ground to prove that the Parliament consisted in those times, only of such as we now call the House of Lords.

A Third work whereby the Opponent would prove the Parliament to consist only of the House of Lords, is, because he findeth many things by them concluded touching the Solemnization, and the settling of the Succession of Kings; both which, he saith, were done by the Lords in Parliament, or those of that House; and I shall crave leave to conclude the contrary: For neither is the Election, or Solemnization of such Election, a proper work of the Parliament, according to the Opponent's principles; nor can they prove such Conventions wherein they were to be Parliaments. Not the Election of Kings, for then may a Parliament be without a King; and therefore that instance concerning William Rufus, pag. 16. will fail, or the Opponent's Principles, who will have no Parliament without a King.

The like may also be said of the instance concerning King Stephen, pag. 18. Much less can the Solemnization of the Election by Coronation be a proper work for the Parliament: Nevertheless, the Opponent doth well know that both the Election of a King, and the Solemnization of such Election by Coronation, are spiritless motions without the presence of the people; and therefore though his instance, pag. 17. concerning the Election of Henry the first by the Bishops and Princes, may seem to be restrictive as to them, yet it is not such in fact; if Matthew Paris may be believed, who telleth us, that in the *Conventus omnium* was *Clerus Populus universus*, and might have been noted by the Opponent out of the Learned Antiquary so often by him cited, if he had pleased to take notice of such matters.

Mr. Selden's
Titles of Honour.

A

A Vindication of the ancient Way

A Fourth sort of Instances concerneth *Matters Ecclesiastical*, and making of *Canons*: and hereof enough hath been already said, that such Work was absolutely challenged by the *Church-motes* as their proper Work; and therefore the Instance, pag. 16, 17. of the *Council* in *Henry the First's* time, and the *Canons* made by the *Bishops* there; and that other called by *Theobald* Archbishop of *Canterbury*, and instanced by the Opponent, pag. 19. I say, both these do fail in the Conclusion propounded.

Fifthly, as touching the most proper Work of *Parliament*, which is the making of *Laws concerning the Liberties and Benefit of the People*; the Opponent produceth not one instance concerning the same, which doth not conclude contrary to his Proposal; for as touching those two instances in his Thirteenth page, *Anno 1060*, they concern not the making of *Laws*, but the reviving of such as had been disused formerly; which might well enough be done by a private *Council*. But as to that in his Fifteenth page, of the Law made by the Conqueror concerning *Remigius* Bishop of *Lincoln*, although it be true, that we find not the particular Titles of *Knights*, *Citizens* and *Burgesses*, yet besides the *Council* of *Archbishops*, *Bishops*, *Abbots* and *Princes*, we find the *Common Council*; for so the word are, *Communi Concilio*, & *Concilio Archiepiscoporum, Episcoporum, Abbatum, & omnium Principum*; although the Opponent would seem to wave these words, & *Concilio*, by putting them in a small Character, and the rest in Great Letters, that the Reader's eyes might be filled with them, and overlook the other.

Tit. Honour,
pag. 709.

Secondly, as to the instance of the *Council* at *Clarendon*, in his Nineteenth page, which he citeth out of *Matthew Paris*, *Matthew Westminster*, and *Hoveden*, although he pleaseth to mention the several ranks of *Great Men*, and those in black Letters of a greater size: and saith, That not one *Commoner* appears; yet Mr. *Selden's* *Hoveden*, in that very place so often by the Opponent cited, tells him, that both *Clerus* and *Populus* were there.

Thirdly, the Opponent citeth an instance of *Laws* made by *Richard the First*, in his Twenty-fourth page; and he setteth down the several Ranks of *Great Men*, and amongst the rest, ingeniously mentioneth *Milites*; but it is with a Gloss of his own, that they were *Barons* that were made *Knights*, whereas formerly *Barons* were mentioned in the general; and therefore how proper this Gloss is, let others judge; especially seeing that not only *Milites*, and *Milites Gregarii*, but even *Ministri*, were present in such conventions, even in the *Saxon* times: And Mr. *Selden* in the former known place mentioneth an Observation, that *Universi personae qui de Rege tenent in Capite, sicut ceteri Barones debent interesse judiciis curiae Domini Regis cum Baronibus*.

Tit. Honour,
pag. 703.

Fourthly, He citeth in his twenty fifth page another instance in *King John's* time, in which, after the assent of *Earls and Barons*, the words *Et omnium fidelium nostrorum* are also annexed, but with this conceit of the Opponent's, that these *Fideles* were those that adhered to the King against his Enemies: be it so, for then the *Commons* were present, and did assent; or they may be, saith he, some specially summoned as assistants; take that also, and then all the true-hearted in the King-

Kingdom were specially summoned, and were there; so as the conclusion will be the same.

In the fifth place, he citeth a strange Precedent (as he calls it) of a Writ of Summons in King John's time, in his Twenty seventh page, wherein *Omnes Milites* were summoned, *cum armis suis*; and he concludes therefore the same was a Council of War.

First, *Because they were to come armed.* It is very true; and so they did unto the Councils in the antient Saxon times, and so the Knights of the Counties ought to do in these days, if they obey the Writ, *Duos Milites gladiis cinctos, &c.*

Secondly, he saith, that the *Knights* were not to come to Council. That is his opinion; yet the Writ speaks, that the *Discreti Milites* were to come, *Ad loquendum cum Rege de negotiis regni*: It is true, saith he, but not *Ad tractandum, & faciendum, & consentiendum*. It is true, it is not so said, nor is it excluded; and were it so, yet the Opponent's conclusion will not thence arise, *That none but the King, and those who were of the House of Lords, were there present.*

The Sixth and last instance mentioned by the Opponent, is in his Thirtieth page, and concerneth *Escuage* granted to King John, who by his Charter granted, *That in such cases he would summon Archbishops, Bishops, Abbots, Earls, and the greater Barons, unto such Conventions by special Writs; and that the Sheriff shall summon promiscuously all others which hold in Capite*: and thence he concludes, that none but the great Lords, and the Tenants in Capite (whom he calls the lesser Barons) were present; but no Knights, Citizens, or Burghesses: all which being granted, yet in full Parliament the Citizens and Burghesses might be there. For Councils were called of such persons as suited to the matter to be debated upon.

If for matters purely Ecclesiastical, the King and his Council of Lords, and the Church-men made up the Council.

If for advice in emergencies, the King and such Lords as were next at hand determined the conclusions.

If for *Escuage*, the King and such as were to pay *Escuage*, made up a Council to ascertain the sum, which was otherwise uncertain.

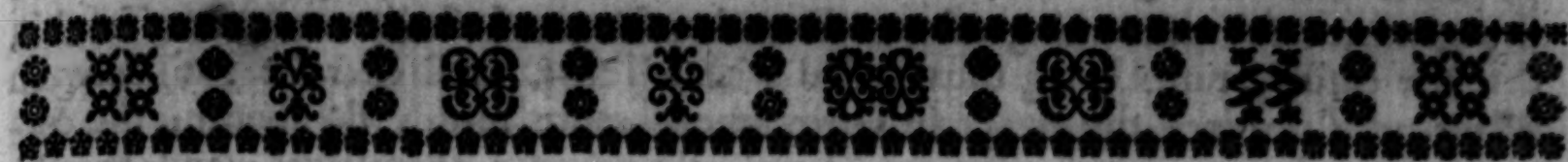
If for matters that concerned the common Liberty, all sorts were present, as may appear out of the very Charter of King John, noted in my former discourse, page 258. and also from an Observation of Camden concerning Henry the Third. *Ad summum honorem pertinet*, (saith he) *Ex quo Rex Henricus Tertius, ex tanta multitudine quæ seditiosa ac turbulenta fuit, optimos quosque ad Comitia Parliamentaria evocaverit.* Little. lib. 2.
cap. 3.
Brit. p. 122.

Secondly, The Opponent takes that for granted that never will be, viz. *That all the King's Tenants in Capite were of the House of Lords*; whenas himself acknowledgeth a difference, pag. 28. viz. *That the Barons are summoned by Writs, sigillatim, as all the Members of the House of Lords are*; but these are by general Summons, their number great; and hard it will be to understand, how, or when, they came to be excluded from that Society.

Of Parliaments in England.

I shall insist no further upon the particulars of this Tractate, but demur upon the whole matter, and leave it to Judgment upon the Premises, which might have been much better reduced to the main Conclusion, if the Opponent, in the first place, had defined the word *PARLIAMENT*: For if it was a Convention without the *People*, and sometimes without the *KING*, as in the Cases formerly mentioned, of the *Elections* of *William Rufus*, and of *King Stephen*: And if sometimes a *Parliament of Lords* only may be against the King, and so without *King* or *People*, as in the Case between *Stephen* and *Maud* the Empress; and the Case likewise concerning *King John*, both which also were formerly mentioned; possibly it may be thought as rational in after ages, for the *Commons* to hold a *Parliament* without a *King*, or *House of Lords*: and then all the Opponent's labour is to little purpose.

THE



THE
SECOND PART,
Or a CONTINUATION of the
Historical and Political Discourse
OF THE
LAWS and GOVERNMENT
OF
ENGLAND.

THE former times, since the *Norman* entry, like a rugged Sea, (*mov'd* by cross Winds of Arbitrary Vapours, in and about the *Crown*; and by Foreign *Blasts* and Engagements from the *holy Chair*) made the true face of affairs cloudy and troublesome, both for the Writer and the Reader.

Henceforward, for the space of Three hundred years next ensuing, *Kings* by experience and observation finding themselves unequal to the double chace of absolute Supremacy over the sturdy *Laity*, and the encroaching *Clergy*, you will observe to lay aside their pretensions against the *Peoples Liberties*, and more intently to trench upon the *Spirituality*, now grown up to defy all Government, but that of Covetousness.

Nor would these times allow further advantage to *Kings* in this work, they being either fainting by the ticklish Title of the Crown, hovering between the two Houses of *York* and *Lancaster*, or drawn off to foreign employments; as matters of great concernment for the present well-being of the Kingdom, or for the spreading of the same of such as desired to be renowned for valiant men.

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The Government of Edw. III. and Rich. II.

It will be superfluous to recount the particular achievements formerly attained by those Ecclesiastical Men; the former Treatise hath already said what was thought needful concerning that. For the future, I shall even premise this, that the ensuing times being thus blessed with a Truce, or stricter League between *Kings and Commons*; the errors in Government more readily do appear; the corruptions in the natures of men more frequently discover themselves; and thereby the body of the Statute-Laws begins to swell so big, that I must be enforced to contract my account of them into a narrower compass, and render the same unto the Reader, so far forth only as they shall concern the general stream of Government; leaving those of privater regard unto every man's particular consideration, as occasion shall lead him. For whatever other men please to insist upon, this I take for a Maxim, *That though the Government of a King is declared by his Actions; yet the Government of a Kingdom is only manifested by ancient Customs, and publick Acts of Parliament.*

And because I have undertaken a general Survey of the Reigns of thirteen several Kings and Queens of this Nation, (for I shall not exceed the issue of *Henry the Eighth*) and to handle each of them apart, will leave the Reader in a Wilderness of particulars, hard to comprehend in the general sum; I shall therefore reduce them all into three heads, *viz.* Interest of *Title*, Interest of *Prerogative*, and Interest of *Religion*; the last of which swayed much the three Children of *Henry the Eighth*; the second as much in their two Ancestors, *viz.* *Henry the Eighth*, and *Henry the Seventh*; and the first in the three *Henries of Lancaster*, and three succeeding Kings of the House of *York*. And because *Edward the Third*, and his Grand-child *Richard the Second*, do come under none of these Interests, I shall consider them jointly, as in way of *Exordium* to the rest, although the course of the latter was as different from the former, as Lust falls short of a generous Spirit.

C H A P. I.

A Sum of the several Reigns of Edward the Third, and Richard the Second.

Several I may well call them, because they are the most different in their ways and ends of any two of that race that ever swayed their Scepter; and yet the entrance of the first, gave countenance to the conclusion of the last. For the Scepter being cast away or lost by *Edward the Second*, it was the lot of his Son *Edward the Third*, a youth of fifteen years of age, to take it up: he knowing whose it was, and feeling it too heavy for him, was willing enough it should return; but being over-swayed by Counsels drawn from reason of State, and pressed thereto by those that resolved not to trust his Father any more, he wisely chose to manage it himself, rather than to adventure it in another hand. But that is not all: for as it is never seen that the Crown doth thrive after its divorce from the Scepter, but like a blasted Blossom, falls off at the next gale of adversity; such was the issue to *Edward the Second*, his power once gone, his Honour followeth soon after: he had ceased to be King, and within a small time did cease to be *Edward*.

His Son, thus made compleat by his Father's Spoil, had the honour to be the

the Repairer of the ruines that his Father had made; and was a Prince which you might think by his Story to be seldom at home, and by his Laws seldom abroad. Nor can it be reconciled without wonder, that Providence should at once bestow upon *England*, a courageous People, brave Captains, wise Council, and a King that had the endowments of them all. Otherwise it had out-reached conceit it self, that this small Island, wasted by the *Barons Wars*, the people beaten out of heart by all Enemies in the time of the Father, should nevertheless, in the time of the Son, with honour wade through so many difficulties of mighty Wars on every side abroad, and devouring Pestilence at home; and yet lay a platform of an opulent, wise, and peaceable Government for future Generations.

Yet he had his failings and misfortunes; a great part whereof may be attributed to infirmity of age, which in the first part of his Reign was too little, and in the latter part too much. True it is, that Governors of the persons of Kings may in some measure supply defects of *Non-age*; but seldom where the Governors are many, and never if they be ambitious. And it was this King's fate to miscarry in both; for he had in his Youth Twelve Governors by constitution; and they, Two supreme by usurpation, viz. the Queen and *Mortimer*, till they were both consumed in the flame which themselves had kindled. And this disparity wrought somewhat unsuccessfully in the King's first War: For the generosity of his spirit (himself being young and active) minded his Council to advise him employment in a foreign War, rather than they would adventure its motion at home, lest it might prove circular; which is most dangerous for Government, if the Prince be not under command of himself.

This first War was with *Scotland*, whose power was inferior to that of *France*; the King young and the danger nearer; and therefore though the last affront was from *France*, and that more fresh in memory, and more poignant, yet the King was advised to give place, and speak fair, till he had tried masteries with *Scotland*, and thereby secured his Rear. This he wisely hearkened unto, and met with such a successful turn of Providence, that like an *O Yes* before a Proclamation, gives warning to *Scotland* that the Wheel is turned upon them; and that there is somewhat more than humane motion in the matter, that exasperates the *English* upon an enterprize so often crossed by Providence hitherto; and the King also (being but a Soldier in hope as yet) to dare against those that had so shamefully foiled his Father, and also put himself already once to the Retreat.

And yet there did concur a kind of necessity of second Causes; for the King found the Crown engaged, and the minds of the *Scots* so elate, as the *English-men's* case was not to live to fight, but to fight to live; and so embittered against one another by the fierce Wars under the *Barons*, that nothing could quench the fire, but withdrawing of the Brands into Foreign Action like some angry spirits, that spoil their own bodies unless they chide or fight it out with others.

In the first brunt with *Scotland*, the King gained nothing, but the understanding of the humours of some of his great Lords, which once purged out, he renews the War, prevails, and after ten years stir (wherein he became a trained Soldier against the *Scots*) he wan the Cross, and then goes to play his prize in *France*, to compleat his Crown with the Flower-de-luce: Which was the great work of the rest of his Reign; in which four parts of five were victorious; the

The Government of Edw. III. and Rich. II.

fifth and last was declining, like some gamesters, that win at first, and for want of observation of the turning of the Dice, come off losers at the end.

For the King being rather satiated than satisfied with Victory and Honour, returned home to enjoy what he had, leaving his Son, the *Black Prince*, to pursue the War, and to actuate the Soldiers alone, who now began to honour his Valour above his Father's. But the Tide is spent, the Prince of Chivalry dies, the brave Commanders wasted; and the *French*, too fickle to continue subject to the *English* longer than needs must, tack about for another adventure, and make it plain, *That France is too big to be Garrison'd by England, and that it will cost England more to hold it, than to have it.*

Antiq. Brit.

His Religion was more to the purpose, than any of his Predecessors since the *Norman* times: He reflected upon God in common events, more ordinarily than the general stream of the *Clergy* did in those days. He loved, if not adored, devout men and their prayers, and yet intently disclaimed all opinion of merits in the Creature. He saw the Pope through and through, loved him but little, feared him less, and yet lost neither honour nor power thereby.

*i. e. Alice
Piers W. Wick-
ham's Neice,
or Sc. and by
him laid in
the King's Bo-
som.
Rich. 2.

His chief policy at home, was, to be much at home, great with his People, and they great with him: what the Parliament did, he accounted well done; he never questioned their power, though he was over-reached in questioning their Wisdom. For he that shall prefer his own wisdom above that of the Parliament, must needs think himself extremely wise; and so much the more to know himself to be such. But the worst of his fate was, to live to his Winter-age, and after fifty years Reign, or more, to die in his minority under the rule of a woman of none of the best fame*, after he had enjoyed the honour of greatest note in the *Christian* world in his days.

Such was not *Richard* the Second, though the only Son of that famous Chief-tain, the *Black Prince* of *Wales*, a renowned Son of a renowned Father; but (as a Plant transplanted into a savage soil) in degree and disposition wholly degenerate, retaining a tincture of the light inconstancy of his Mother, and the luxuriousness of his great Grandfather *Edward* the Second; and running his course, he came to his end.

The lib. 4.
c. 21.

† Grandfa-
ther.

His entrance, however by colour of Inheritance, yet was a greater adventure than his Predecessor's, that came in by Election; upon the designation of his Father† by his last Will, say some. For this man came in upon many disadvantages, both of time and person: The times were very troublesome, the Kingdom new wrapped up in a double War abroad, (and which is worse) flooded with distraction at home, contracted partly by his Predecessor's weaknesses in his decrepit estate, partly by a new interest of Religion now sprung up against the Papal Tyranny, from the Doctrine of *Wickliff*; all which required a very wise Man, and a brave Commander; in both which the King failed.

Religion now began to dawn through the fogs of *Romish* Usurpations and Superstitions, aided thereto by a Schism in the Triple Crown, that continued forty years, with much virulency abroad, and with as bad influence upon our Mitres at home. Some of whom were called *Clementines*, others *Urbanists*; and yet none of them all worthy of either of the names, in their proper signification. The Laity, though lookers on, yet were not quiet: For though Liberty be a hopeful thing, yet it is dangerous to them that are not a Law to themselves, especially in matter of

The Government of Edw. III. and Rich. II.

5

Opinion; for that arraigns the Rule, and lays the way open to licentiousness. And now that the Liberty from the Keys began to be taught as a duty of Religion, the inferiour sort meet with Doctrines of licentiousness, upon mistake of the notion; and will acknowledge no rule, now they must be all at liberty: And thus sprang up the insurrection of the Servants and Bond-men against their Lords and Masters under *Cade* and *Straw*; that might have brought the Commonwealth into a hideous Chaos had not the Lords and Great Men betimes bestirred themselves; and the King shewed an extraordinary spirit, or rather a kind of rage, that put itself forth beyond the ordinary temper of his mind. Much of this mischief was imputed to *Wickliff's* Doctrine; for it is an ordinary thing to proclaim all evils concurring with the very joint of Reformation, to be the proper fruits thereof: But I look upon it as a fruit of Corruption, that endeavours to stop the breath of Reformation in the birth. And there is somewhat of a hidden influence from above in the thing; for it was not only the Cup of *England* to be thus troubled, but *France* and other places had their portion suitable.

Hist. Eccles.
Ang.

Antiq. Brit.
262.

The King's minority rendred him unequal unto these contrary motions; he was in his *Eleventh* year, when he entered the Throne; and (which was worse) his years came on faster than his parts, but his work posted before them all. The common help of *Protectors* left him yet more unhappy; for they were prepossessed with strong engagements of particular Interests; and so were either not wise enough, or not good enough for all. This brought forth a third inconvenience, the change of *Protectorship*; and that a change of Affairs and Interest, an uncertain good that brings forth a certain evil; for variety of Instruments and Interests move several ways, and though the end be one, the difference concerning the way many times doth as much hinder the Journey, as so many blocks in the way.

The *Protectorship* was thrice changed; the King's uncles had the first essay; any one of them was big enough for one Kingdom, but all of them together were too great to make one *Protector*. The Duke of *Lancaster* would have done well alone, if he had been alone, and minded that work alone; but he being somewhat engaged with the *Wickliffists*; and so entangled with the Clergy, and other restless spirits; and drawn off by his private aim at the Crown of *Castile*, saw this work too much; and so he warily withdrew himself, leaving the *Directory* to a Committee of Lords: a sovereign Plaister, questionless, where the times are whole; but not for these distractions, wherein even the Committee itself suffered its share. Thus the breach is made the wider; and for a cure of all, the Government is committed into one hand, wherein the Earl of *Warwick* acquitted himself well, for he was wise enough to observe such as the people most honoured. And thus passed over the two first years of the King's Reign.

vide post. p.
36.

The remainder of the King's minority, was rather in common repute than in true account. For the King, however young, took little more from the *Protector* than he saw meet, to colour his own commands with opinion of Regularity; and so his Will came to full strength before his Wisdom budded. Thus lifted up, he sets himself above all interests of Parliaments, *Protectors*, Councillors, Uncles, Wise men, and Laws; leaving them all to be rules for those below. And so long as the King's desire is thus served, he is content to be reputed a *Minor*, and be as it were under protection of others, though not under their direction; and is

* Note, This induced the Ecclesiastics (especially *Wickham*, &c.) to publish most malicious Scandals against *Gaunt*, which occasioned the several Statutes *De Scandalis Magnatum*, 5, and 10 R. 2.

is content to continue thus until his Two and twentieth year. Some might think him very moderate, had he been moderate; but he forbears suing out his *Livery*, so long as he might live without care, and spend without controul. For by this time the humour of his great Grandfather budded in him; he pawned his Heart to young men of vast desires, and some say so inordinately, as he prostituted his Chastity unto them*. And it is no wonder if the Revenues of the Crown are insufficient for such Masters. This the people soon felt, and feared their own *Freeholds*: for they are bound, saith he, not to see the Crown deflowered for want of maintenance; it is very true, nor to see the *Crown deflowered of its maintenance*. A Parliament therefore is called; in which divers Lords associate, and prepare Physick for the King's lavish humour; which being administered, wrought for ten years after, till it had purged him of his Life, and the Kingdom of their King.

* (and they to him.)

11 Rich. 2.
n. 8. 13.

† Corrupt
Judge.

It was an Act of Parliament that gave power to fourteen Lords and others to regulate the Profits and Revenues of the Crown, and to do Justice to the people; this was to continue for one whole year. The Parasites no sooner found the effect hereof to their cost, but the King grows sick of it, and finds an Antidote to overrule Acts of Parliament, by Acts of *Privy Council*; declares this ill-favoured Commission void, and the Contrivers, Advisers and Enforcers, Traytors.* To make it more Majestical, he causeth the *Judges* to subscribe this Order, and so it becomes Law in repute. This foundation thus laid, he buildeth in haste an Impeachment of these Commissioners of High Treason; and supposing that they would not readily stoop, himself stoops lower; for he would put his Right to trial by Battle, which was already his own by the judgment of the Masters of the Law†: For so they may be well called, seeing they had thus mastered it. In this the King had the worst, for he lost his honour and himself: God hath a care of common Right, even amongst Idolaters. Then comes the *Parliament of Wonders*, wherein the *King's party are declared Traytors*, and the *chief Judges with their Law judged by another Law*. The King not meddled with, thinks it high time to come out of his *Minority*, and assumes the government of the Kingdom, and himself, to himself, being now Three and twenty years of Age; old enough to have done well, if he had cared for it. But resolving to follow the way of his own will, at length it led him to his own ruine. Only for the present two things delayed it, viz. the Authority, Wisdom, and Moderation of his Uncles, especially of the Duke of *Lancaster*, now come out of *Spain*; and the great affection which the King pretended to the Queen, who had also gained a good opinion amongst the people. The benevolent aspect of the people, not for their own advantage, but for the publick quiet, procured many Parleys and Interviews between the King and People, and many Laws for the upholding of the Court and Government; although both War, Laws, Justice, and Councils, all are faint, as all is faint in that man that hath once dismann'd himself. This he perceives well enough, and therefore Peace he must have by any means. The Queen dies; himself being nigh Eight and twenty years old; takes a Creature like a Wife, but in truth a Child of Eight years old, and this is to get peace with *France*. It is no wonder if now he hunts after unlawful game, and that being ill taken, brings all things out of order; *For abused Marriage never wants w.e.* Civil men are now looked upon as severe *Cato's*; and his Uncles, especially the Duke of *Gloucester*, with a jealous eye; which accomplished his death in the conclusion.

The

Hertford 2 -

The Dukes of *Lancaster* and *York* forsake the Court, Favourites step into their rooms. The old way of the eleventh year is reassumed; *Belknap* and others are pardoned; and made of the Cabinet. The pardon of the Earl of *Arun- del* is annulled, contrary to the advice of the major part; and the Archbishop, the Earl's Brother, is banished. The Lords forsake the wilful King; still the King's Jealousy swells. The Duke of *Hertford* banished, or rather by a hidden Providence sent out of the way for a further work. The Duke of *Lancaster* dies, and with him all hope of moderation is gone; for he was a wise Prince, and the only Cement that held the joints of the Kingdom in correspondency: yet he was ill requited, for all his Estate is seized upon. The Duke of *Hertford* and his party are looked upon by the people as Martyrs in the Common Cause, and others as Royalists. Extremities hasten on; and Prerogative, now upon the wing, is towering above reach. In full Parliament, down goes all the work of the tenth and eleventh years Parliament: which had never been, if that Parliament had continued by adjournment. The King raiseth a power, which he calleth his *Guard*, of *Cheshire*-men; under the terror of this displaying Rod, the Parliament and Kingdom are brought to Confession. *Cheshire* for this service is made a Principality; and thus goes Counties up, and Kingdoms down. The King's Conscience whispers a sad message of dethroning; and well it might be, for he knew he had deserved it. Against this danger he entrenches himself in an Act of Parliament, that made it Treason *To purpose and endeavour to depose the King, or levy War against him, or to withdraw his Homage, hereof being attainted in Parliament.* And now he thought he was well guarded by engagement from the Parliament; but he missed the right conclusion, for want of Logick: For if the Parliament itself shall depose him, it cannot be made a Traitor, or attaint it self: and then hath the King gained no more than a false birth.

21 Rich. 2.
cap. 9.

21 Rich. 2.
cap. 3.

But the King was not thus quiet, the sting of guilt still sticks within, and for remedy he will unmake the Law; and get it enacted, That all procurers of the Statute of 10 *Richard* the Second, and the Commission and procurers of the King's assent thereto, and hinderers of the King's proceedings, are adjudged Traitors. All these reach only the Branches, the Root remains yet, and may spring again; and therefore in the last place have at the Parliament itself. For by the same it is further declared, *That the King is the sole Master of the Propositions for matters to be treated in Parliament, and all gainsayers are Traitors.*

Secondly, *That the King may dissolve the Parliament at his pleasure, and all gainsayers are Traitors.*

Thirdly, *That the Parliament may not proceed against the King's Justices, for offences by them committed in Parliament, without the King's consent; and all gainsayers are Traitors.* These and the like Aphorisms once voted by the *Cheshire*-men, assented unto by the Parliament, with the King's *Fiat*, must pass for current to the Judges; and if by them confirmed or allowed, will in the King's opinion make it a Law for ever, That the King in all Parliaments is *Dominus fac primum*, and *Dominus fac totum*. But the Judges remembered the Tenth year, and *Belknap's* entertainment, and so dealt warily; their opinion is thus set down: *It belongeth to the Parliament to declare Treason; yet if I were a Peer, and were commanded, I should agree.* So did *Thirning* under-write; and thereunto also consented *Rickill*, and *Sir Walter Clopton*; the last being Chief Justice of the King's Bench, the first Chief-

Chief-Justice of the Common-Pleas, and the second another Judge of the same Bench. The sum in plainer sense is, that if they were Peers, they would agree; but as Judges, they would be silent. And thus the Parliament of *England* by the first of these four last-mentioned conclusions attainted themselves; by the second yielded up their Liberties; by the third their Lives; and by the last, would have done more, or been less: and to fill up the measure of all, they assigned over a right of Legislative Power to six Lords, and three Commons; and yet the King, not content, superadded, that it should be treason for any man to endeavour to repeal any of their determinations.

The Commonwealth thus underneath, the King tramples upon all at once; for having espied the shadow of a Crown fleeing from him in *Ireland*, he pursues it, leaves the noble Crown of *England* in the base condition of a Farm, subject to strip and waste by mean men, and crosses the Irish Seas with an Army. This was one of *England's* Climacterical Years, under a Disease so desperate, that no hope was left but by a desperate Cure, by sudden bleeding in the Head, and cutting off that Member that is a principle of motion in the Body. For it was not many Months e'er the wind of affairs changed; the King now in *Ireland*, another steps into the (English) Throne. The noise hereof makes him return, afar off enraged; but the nigher he comes, the cooler he grows; his Conscience revives, his Courage decays; and leaving his Army, his Lordship, Kingdom, and Liberty behind, as a naked man, submits himself to release all Homage and Fealty; to resign his Crown and Dignity, his Titles and Authority; to acknowledge himself unworthy and insufficient to reign; to swear never to repent of his resignation: And thus, if he will have any quiet, this wilful man must be content for the future, neither to will nor desire. And poor *England* must for a time be contented with a doleful condition in which the King cannot rule, and the Parliament will not, and the whole Body like a Chaos capable of any form that the next daring spirit shall brood upon it.

C H A P. II.

Of the State of the King and Parliament, in relation of it to him, and him to it.

A King in Parliament is like the first-born of *Jacob*, *The Excellency of Dignity, and the Excellency of Power*; but alone, unstable as water. Examples of both these we have in these two Kings; *Whereof the first was Crowned by the Parliament, and Crowned it; the latter also Crowned it, but with Thorns; and yet the Parliament in all beld on that wise way, that it neither exceeded its own bounds, nor lost its own right.*

I shall enter into the consideration of particulars under these heads: First, *In relation more immediately to the interest of the King*; Secondly, *To the interest of the Kingdom in general.* The King, though higher than all the people by the head, and so hath the Prerogative of Honour as the most worthy, yet his strength and abilities originally do rise from beneath; otherwise, he is but like a General without an Army, the Title big, but airy; and many times his person subject to so much danger, that instead of drawing the Eyes of all the people to look upon him with admiration, they are drawn to look to him with observation;

servation; and in this respect he may be said to be less his *own* man, and *more the Kingdom's*, than any of the inferiour sort. This befall in both these Kings in a special manner; each entring upon the grand Government of a Kingdom, before they were able to understand the Work, or govern themselves; and therefore were under power of *Protectors* for the guard of their Persons and their Education, and of the *Parliament* for Counsel and Direction in Cases relating to the Kingdom. The Child of a mean man, when its Parents are dead, is *Filius Amici*; but a King is *Filius Populi*, to be by them trained up in such manner, that he may be *Pater Populi* when he is come to age. In the mean time, though he be a King, yet his Person like a precious Gem must not out of the Ring, but must be directed by Council, and though under some kind of restraint, and the Counsellors all the while no Offenders in such cases against the Prerogative Royal. And therefore, ^{1 E. 3. Stat. 1.} though it be true that Kings grow faster than other men, and sooner come to full age than they; yet *Edward* the Third, now in his sixteenth year, might not pass over Sea into *France*, though it were for restoring of Peace, but by direction of the Parliament: nor is it meet in such cases, that Kings should stand upon the Prerogative of a *Negative*. Secondly, it may likewise be said, *That his Family is less his own, as he is a man, than other mens*: For private Families are no further under the publick Law, than in relation to the publick Peace, to punish after breach made; but the Families of Kings are looked upon by all in relation to the honour and profit of the Publick; not only because the King's servants have, by their nigh attendance upon his person, a more powerful influence into his actions, which may reflect a malevolent Aspect upon the whole course of affairs, if they be not better ordered that are so nigh him; but more especially in regard that the government and order of the Royal Family trencheth deep upon the Honour of the Kingdom, and Purges of the People, who are concerned to see the same accommodated suitable to the State and Port which the Nation would bear forth to the World. And therefore for the Parliament to intermeddle in the King's Family, is not foreign nor new. *Alice Piers* was a Familiar, if not of the Family of *Edward* the Third; yet both herself, and others of that Family, were complained of as a grievance. *Richard* the Second was once a young man, and ever a young King; and what *Edward* the Third wanted only in his Youth, and in his infirm old Age, this man ever wanted: for he that knew not how to govern himself, how much less could he govern his Family? And if in this condition the Parliament become his Stewards, to set a yearly Survey and Check upon his Servants and Family, in order to the good order of the same and Kingdom, otherwise men must conclude, it did that which was just; though *Richard* the Second, and those of his mind, think not so. ^{9 Rich. 2. n.} But this is not all; Kings have not only such as serve the outward man, but some ^{31.} that serve their Consciences, of old time called *Confessors*; in these days without ^{11 Rich. 2. n.} the name, for fear of Superstition; yet the thing remaineth still in some well-favoured Chaplain, [or Bishop] whose work is to lead the King's Conscience in dark ways, or rather into them. Commonly he hath a *devout* outside, and that is the *King's-Idol*: but if while his eye be towards *Jerusalem*, his mind be towards the dead Sea, the King is his; and then the blind leads the blind: Like some *Ignis fatuus*, to such as know it not. No man is so well known by his company, as Kings are by these men, and these men by their actions. Although some have been so witty as to cheat the whole Generation of Mankind, by entertaining holy men to be their Chaplains; themselves the mean time without any spark of that

5 Rich. 2. n. 17, 18. holy Fire: Yet this King was not so cunning; he had a *Confessor* of his own choice, and according to his own heart, who was complained of as a grievance, and the Parliament removed him. So high they ventured, even to invade the King's own *Conscience*, if it may be called *Conscience*, that will acknowledge no Law but that of its own mind.

Thirdly, the King's *Revenue* was under the check and controul of the Parliament; for it befalls some Princes, as other men, to be sometimes poor in abundance, by riotous flooding treasure out in the lesser currents, and leaving the greater channels dry. This is an insupportable evil, because it is destructive to the very being of affairs, whether for War or Peace. *For the King's Treasure is of a mixt nature, much of it being intended for publick service, as himself is a publick person.* And for this cause he hath Officers of several natures attending upon his Treasury: Some for Land, some for Sea, some for the general Treasury of the Kingdom, some for that of the Household, and some for the *Privy Purse*: The common end of all being to maintain State in time of Peace, and strength against time of War. Because it is no easy matter to maintain the just proportions for each of the said ends, it is the less wonder that such a brave Prince as *Edward the Third* should labour under want for maintenance of the Wars; and so lavish a Spendthrift as *Richard the Second*, should labour under more want, to maintain his port and countenance in peace. And therefore, though it be true that the publick Treasury is committed to the King as the chief Steward of the Realm; yet it is as true, that he is but a *Steward*, and that the *supreme Survey of the Treasure* resteth in the Parliament, who are to see that the Treasury be not irregularly wasted, to reduce the same into order; and for that end to call the Treasurers and Receivers to account, to see to the punishing of such as are unfaithful, and encouraging of others that are faithful. For when by extravagant courses the Treasury is wasted, by extraordinary courses it must be supplied; which ever is out of the *Subjects Purse*. And in such cases it is great reason they should observe which way the course lies of such Expenses. If then in such cases sometimes the Parliament hath stayed the issuing out of the King's Revenue for some time, or otherwise viewed and examined the same,

2 Rich. 2. n. 12. charged it with conditions, 22 E. 3. n. 29. 14 R. 2. n. 15. limited it to certain
9 Rich. 2. n. 4. or 41. uses, and in case of misuser, refused to levy or make payments; the case will be
14 E. 3. n. 6. without dispute, that the Parliament ordered the *publick Treasury* as they saw most
27 E. 3. n. 8. need. But much more, if we consider how the greatest part of this Treasury
9 R. 2. n. 40. was raised, viz. not from the *old Revenues* of the Crown, but by *new Impositions*,
15 E. 3. n. 16. Levies, and Assessments laid upon the People, even what *they* pleased, and in what
manner *they* thought meet, and not otherwise. *Aids* are lawful, if they be legally
given by common consent of Parliament. *Taxes*, if legally given by Parliament,
14 E. 3. c. 20. are no less lawful; yet they must be collected in such manner, and by such means
as the Parliament's order doth direct. *Loans* of moneys to the King may be made
by them that will; but the King must not demand them, because the Subject hath no
25 E. 3. n. 16. means to recover the debt. This trick had been lately tryed by *Edward the Second*,
much money he got, and it was repayed by the Order of the Parliament, not to
pay it. But of all the rest, nothing shewed more absolute Authority in the publick
1 E. 3. vet. 1. Revenue, than the care that was had of the *Demefies* of the Crown; for whereas
the Expenses of Kings grew so vast, that neither the yearly Revenue could suffice,
nor Aids, Assessments, and Taxes could satisfy, however ordinary they in these
times

times were become; rather than Kings would contain themselves, they would invade their own *Demefnes*, by pawning, selling, and giving them away, either for love or money: and thus was poverty treasured up against the future, both for King and Crown. The Parliament espying this leak that was like to undo all, applied a speedy remedy, undoing what was done, and undoing some by an *Act of Resumption*; and thereby taught Kings to look to their Honour better for the future, and People also to take heed of meddling with such ticklish matters, and to know that he that hath such in his possession, hath them by a crack'd Title, that cannot be amended but by Act of Parliament. 1 Rich. 2. n. 48.

Fourthly, an *English* King is no *Out-law*; nor can he do any wrong *, though the *Man* may. He hath a double relation, *one as a King, the other as a Man*; and the uniting of both in one person, hath cheated many a man of his judgment in the case of Prerogative. He hath a double Will, and these many times contrary, equally as in other Relations; and in this contrariety, sometimes the King overcomes the Man; but oftner the Man the King; so as if any man, the King hath much more cause to cry out, *O miserable man!* These divers Wills are generally led by divers Rules: One of a man, which many times reacheth no higher than the Affections; and if the man be weak, they deserve little better name than Lusts. The rule of a King is *Law, or Councils* (of these in their place;) and unto these in all prudentials, he must submit his Judgment and Will, as he is a King. Nor can he do otherwise, unless he will presume to be wiser than his Council. Suitable hereunto doth that clause in one of the Statutes of these times conclude, *viz. That the King is bound by his Oath, to pass all Laws that are for the good of the Kingdom* †. For were the power of Election, or determination of the point, only in the King, then were the *Oath* in vain; nor is the Parliament at all (in case of the King's dissent) to judge of the convenience or inconvenience of Proposals made for the good of the whole body, according to that power which is exercised in these times. Nor is it irrational to infer here from that, if Law and Council be the Rule of a King, then the Obedience of the People unto this King must be in order to Law and Council, otherwise the Disobedience cannot be determined to be against the King, but against the Man; and though against the private Will of the Commander, yet not against the Law; nor therefore can it be said illegal or unjust. The Parliament in these times held forth this Doctrine plainly to the World, *That it is their proper work, in Cases needful, to do right to such as are wronged by the King; his Command is no Warrant in such Cases.* If a man be wrongfully imprisoned by him, he shall be released and set at liberty by them. Let his Act be never so authentical under the Broad Seal, it can take no man's Right away. *Richard* the Second did his utmost to satisfy and quiet the tumultuous Rabble under *Cade* and *Straw*, and granted store of Manumissions to the Bond-men by Declaration, and by his Letters-Patent; but not one of them was good enough to deprive any one of the meanest of the *Freemen* of their Rights in those Bond-men. The privilege of shewing mercy, and granting pardon, hath been anciently entrusted to the King, as an Overseer of the execution of Law; yet he hath not that Prerogative, *To have mercy on whom he will have mercy.* Ever since this Nation had learned to read the Bible, *Murther* hath been excepted from mercy; nor did the Law ever allow any King that Prerogative to pardon that. *Edward* the Third did not challenge any such, not only bound thereto by his *Coronation-Oath*, but

1 Rich. 2. n.

48.

* i.e. as King. See the conclusion of the First Part.

25 E. 3. Provisor.

† Et quos Val-gus eligerit.

21 E. 3. n. 64.

3 Rich. 2. n.

38.

2 Rich. 2. n.

38.

15 E. 3. n. 6.

7.

E. 3. Vet. 1.

15 E. 3. c. 3.

11 Rich. 2. n.

11, 12, 15, 17.

5 Rich. 2. n.

8, 12, 13.

10 E. 3. c. 4.

14 E. 3. c. 15. by publick *Acts of State* declaring the same: yet because the Parliament was not
 2 E. 3. c. 2. always sitting, and Kings were ever subject to this Temptation, to *favour Servants*
 by granting mercy to Malefactors; a general Rule of Inhibition is made against all
 pardon, to be granted by the King in case of *Felony*, but only in cases allowed by
 advice of the Council. It is true, that in the first times of *Richard* the Second, he
 13 Rich. 2. liked not to be thus girt in his power, which he pretended was more at liberty in
 St. 2. c. 1. his Predecessors; possibly he meant King *John*, and *Edward* the Second, who
 many times did what they listed: yet under his favour, no Law was so shameless,
 as to hold forth such a power, 'till *Richard* the Second's Law countenanced it.
 11 Rich. 2. But why do I call it a *Law*, which is only a *Declaration* by consent of the *Lords*,
 n. 36. such as then were; the *Commons* would never own such an Opinion: And there-
 21 Rich. 2. fore it soon proved abortive; for within three or four years, by publick Act of Par-
 n. 35. liament, it is peremptorily declared, That the King's *Pardon* shall not extend to
Murder. So as upon the whole matter it is plain, *That it is not the King's Will,*
though supported by the Council of Lords, and backed by the Opinion of the Judges,
that must be a Rule for the Government of this Kingdom; nor doth any Allegiance bind
Obedience thereunto, in Cases where Justice or the Liberty of the People is concerned.

Three things yet remain which Kings have claimed to be their own, viz. *Con-*
ferring Titles of Honour, and Places of Trust, and the Legislative Power. The
 first is but a Feather, and not worthy of regard; yet it is plain that these times
 produce many precedents of *Dukes, Marquisses, and Earls*, made in *Parliament*;
 and possibly it may be apparent, that the first motion of any such Title of Honour,
 did first force its original thence, if not in the Field: but it is not worthy of the
 labour to inquire. The second is more considerable; viz. *The Power of conferring*
Places of Publick Trust: This, Kings have pretended unto, although in course of
 congruity it will be thought more meet, that it belongeth rather to that chief and
 grand Trust of the whole Kingdom committed to the Parliament: And the practice
 of these times is not much discrepant, whether we regard such as are for advice or
 execution. Of the first of these, are those whom we commonly call the *Privy*
Council, whose advice in course toucheth first upon the King's Person, but by re-
 flection worketh strong impressions upon the People, so far as the influence of the
 King's power extends. And therefore it is not beyond the Sphere of the Parlia-
 ment to interpose and qualify that influence, so as it may be for the general good of
 the whole Kingdom. For many times Kings are either *above* or *beneath* themselves;
 and in such cases, if the Council be of the King's suit, he is of the deeper dye,
 and proves more Malignant to the People. *Edward* the Third, growing into great
 opinion in the World, his proportion exceeds his own portion, and the People's
 14 E. 3. n. 55. good-wills to boot; they think the fault is in the *Privy Council*, and an Inquisition
 50 E. 3. n. 10. is set upon it. So also they do in his fiftieth year, when he grows downward. And
 1 Rich. 2. n. the like in the beginning of *Richard* the Second's Reign, he being now a Youth,
 51. and therefore unstable in his Resolutions; and unable to make Election. So as upon
 the whole matter, if the King fall short in point of Judgment or Resolution, or
 3 Rich. 2. n. inordinate in his Affections; but more especially where they observe the major, or
 34. more considerable part of the Council to draw towards ill *designs*; in such cases as
 5 Rich. 2. n. these, the Parliament, as its own duty, undertook to settle a good Council about
 17, 18, 28. the King's person, that might advise him during their recesses. For the *Privy Council*
 6 Rich. 2. n. is never more itself, than when it is an Epitome of the *Common-Council* of the
 19. Kingdom.

Kingdom. In like manner such Officers as concern *execution* of Law and Counsel, are as narrowly to be enquired into: for if their motion be irregular, it is less material what the rule be. The Parliament therefore held it their duty to interpose in the *Election* of *grand Officers* of the Kingdom, such as are the *Chancellors, Treasurers, Judges, and Justices*; or to confirm or displace them, or bind them by Oath. The Rolls of the eighth, fourteenth, fifteenth, and thirty-sixth years of *Edward* the Third; and the sixth, tenth, and eleventh years of *Richard* the Second, do manifest this sufficiently: [and the like does History, in the Times of King *John, H. 3. &c.*]

I have done with the Subject-matter or work of the Parliament, in the mutual relation of the King and it; the *manner* of proceeding was either jointly with the King, or without him; and either jointly with the two Houses, or severally; and either immediately by themselves, or their Committees. As touching the first, it is evident, that in all matters wherein gain ariseth to the Crown from the people, by *Subsidy*, or otherwise, the strength of the Grant by Act of Parliament resteth in the two Houses; and that the King's *Assent* is but *pro forma*, as touching that matter; and therefore such Grants have been made as tended in some measure to derogate either from the King's wisdom, care, or fidelity; yet even these have passed with the *Royal Assent*, though the full *Assent* or good-will of the person of the King was not correspondent thereto; as in these Cases formerly noted, where Subsidies were given with Limitations and Conditions, and upon rendring account to the people. And it is as evident, that where the King's person is disabled to understand, (as in case of Infancy) there the *Royal Assent* can bear little weight with it; but most of all in the King's absence, where either the *Assent* is put thereto by Commissioners, that know not the King's particular mind, or the Act is done only by the Houses, in nature of *Ordinances*; and yet these are of force to bind all parties but the King. But nothing more debased the *Royal Assent* in these times, than a trick that *Edward* the Third plaid in the midst of the fullest strength of his Government. It was in time of War, which never is time of good Husbandry and laying up, nor of sober advice in laying out, nor of equity in levying and collecting moneys for the Nerves of War. This forward Warrior, in the heat of his Atchievements, finds his strength benumbed for want of money; he leaves off, comes home, rages against his Archbishop, to whom he had committed the care of provision for his War; and the Archbishop as hotly falls upon some of the Treasury in the Army on the one side, and upon others in the Country; whose oppressions, saith he, instead of bringing in money, made the people to give a stop thereto. A contest hereupon thus had, it was concluded by the power of the Parliament, that such men should be questioned, and that the Parliament from time to time should call all Officers of State to account; and thereupon ensues a calm. After the Parliament ended, the King repeats the matter; it makes his heart sick; he disgorgeth himself by a Proclamation, made by advice of Nobles, and Wise men, as he saith; and tells all the World he *dissembled with his Parliament*; and what he did was done by dures of mind, to please for the time, and to gain his ends; which being now had, he by his Proclamation revokes what he had done in Parliament, or endeavoured it. And thus is *England* put to School to learn to dissolve three hard knots: First, *Whether a King can dissemble with his Parliament?* Secondly, *Whether Edward the Third his dissembling assent makes a Law?* Lastly, *Whether*

37 E. 3. n. 34.

1 R. ch. 2. n.

5 Rich. 2. n.

75.

15 E. 3. c. 3.

Antiq. Brit.
Ecclef.

15 E. 3. 50.

by

by a Proclamation, by advice of Nobles and Wise-men, he can declare that he dissembled with his Parliament, and therein not dissemble the Royal Assent, so as to bring all the Laws made in any King's time into question, at least during his Life? However the result may be, it is evident, the Royal Assent gets no honour hereby, and the Statute as little, that hath suffered this * Proclamation all this time to pass among the number of the Statutes in Print as a Law, whereas many Statutes that are Laws of note, are left out as useless.

* King's Proclamation, obtruded at Law, by connivance of— &c. &c.

Although in the general, the two Houses joined in every Act *Ad extra*, yet *Ad intra*, and in relation one to another, they had their several operations; the House of Commons intermeddled more in the matter of *Fact*, the House of Lords in matter of *Right*; although in either of these there is a mutual aspect from both. In matters of *Judicature*, much rested with the Lords, and therefore it is ordained, that *The House of Lords shall remedy all offences contrary to the Law of Magna Charta*. And in cases where no remedy is left, nor Judgment by the Law, the matter shall be determined in Parliament, and the King shall command execution to be done according to the Judgment of the Peers. Which Laws seem to be but declarative of the former Law, and in the nature of reviving that power into Act which was formerly laid asleep; and doth strongly imply that the ultimate act in *Judicature* rested with the Lords, in relation not only to the House of Commons, but also in relation to the King, whose work in such cases is, not to judge above or with the Peers, but to execute their sentence. And that carries with it a List, whereby the power of a King may appear not to be so Supreme in making of the Law, as some would have it; for if his Judgment and Conscience be bound by the Votes of the Peers in giving a Law, in case of a particular person where the Law was not formerly known, let others judge of the value of this *Negative Vote*, in giving Law to the whole Kingdom. It is true, that this Parliament was quarrelled by the King, and he kept it at a bay by a Proclamation that pretended Revocation, as far as a Proclamation could revoke an Act of Parliament; but it effected nothing, nor did the contest last long. Now though this Jurisdiction thus rested in the House of Lords, in such cases, as well as in others; yet is it not so originally in them, as to be wholly theirs, and only as they shall order it. For the Commons of *England* have a right in the course and order of Jurisdiction, which (as the known Law) is part of their Liberty; and in the speedy execution of Justice, as well as they have right to have Justice done. And therefore, whereas in Cases of *Error*, and *Delays*, the Appeal was from the inferiour Court to the Parliament; which immediately determined the matter, and now the trouble grew too great by the increase of Pleas: for remedy hereof, a kind of Committee is made, of one Bishop, two Earls, and two Barons, who by the advice of the Chancellor, Treasurer, and the Judges, shall make good judgment in all Cases of Complaint of delay in Judgment: which Committee is not made by Order of the Lords alone, which they might have done, in case Jurisdiction had been wholly and only shut up in their custody; but by Act of Parliament, and joint concurrence of the Commons with the Lords. For as the Commons challenge speedy Execution of Justice, as one of their Liberties: so also to be under the Jurisdiction of such Judges, and Courts, as the Laws (in the making whereof, themselves challenge a vote) do establish and appoint.

15 E. 3. c. 1.
15 E. 3. c. 3.
4

14 E. 3. c. 5.

I will conclude this Chapter with the Constitution of the Parliament in these times. For, the difficulties that beset between the Kings and their people, or

Houses of Parliament, wrought two sad effects, viz. *A propensity to decline calling a Parliament so often as was used and expected; and when it assembled, as great a propensity in the Members to decline their attendance:* by means whereof, as the ^{Walsing.} Historian tells us, the Parliament was sometimes enforced to adjourn itself for want ^{An. 1315} of number sufficient. The first of these arose from want of good-will in the Kings; the other, from want of Courage and Zeal in the people. *The first of these was fatal and destructive to good Government:* for though in distempered Parliaments it is good to withdraw, yet in distempered times it is necessary to meet, and gain a right understanding of all parties; and therefore these times were so happy as to bind themselves by publick Acts of State to re-continue the assembling of Parliaments. For the face of the Times represented unto all, that agitations were like to be quick, violent, and to continue for some succession of time. It is therefore safe, if not necessary, that every eye should be open, and Councils ready for every occasion. A Law at length is agreed upon, that *A Parliament shall be holden once* ^{4 E. 3. c. 14} *every year, or more, if need be.* But in Thirty years the power of this Law is wasted out of mind; and the evil reviving, revives also the Statute; and yet they ^{36 E. 3. c. 10} had Thirteen or Fourteen Parliaments in Thirty years space, and not above Three, or but once Four years distance of time between any Two of them in Succession. This was the sense of the Members of the Houses in their meeting; but at home, they had homely conceits; and it is found no less difficult to bring them to the meeting, than to continue the meeting according to the Law; being either loth to adventure their thoughts into the troublesome affairs of the Publick, or their persons to expence and hazard. But the publick must be served; and therefore an Act of Parliament is made, *That all such Members as decline their appearance at the Parlia-* ^{1 Rich. 2. c.} *ment, after Summons made, shall be amerced, and the Sheriffs likewise that shall neglect* ⁴ *return of Summons.* And the Statute implyeth that it was no introduction of a new Law, but a reviving of former Law now or lately disused, or a Custom now out of custom. And to take away all objection in point of charges and expences, another Law was made to establish the Assessments, and levying of their wages, up- ^{12 Rich. 2.} on the Lands that anciently were chargeable therewith, in whose hands soever the ^{c. 12.} same shall come.

I shall conclude with this, That the Parliament, though like a Garment, it sometimes covers the goodly feature and proportion of a well-composed body, yet it keeps the same warm, and as a Shield is first in all dangers, and meets with many a knock which the body feels not; this is their work and reward. It is true, that in the wearing it is felt heavy; but it is the easier born, if it be duly considered, that it is better to be so cloathed, than to be naked [to the Insults of arbitrary Power.]

C H A P. II.

Of the Privy-Council, and Condition of the Lords.

THE latter must make way for the former; for according to their personal esteem in their own Countries, such is their Authority at the Board in joint Councils. And it was one point of happiness in a sad time of War, that all men looked one way. The Lords were much addicted to the Field, and could do much with *Edward* the Third, who was a brave Leader; and more with the people, who had been so long time used to the rough Trade of Soldiery, that they loved not to be at home about matters of Husbandry, wherein they had so little experience. And having so fair a Garland in their eye as *France*, it is no wonder if domestick designs seemed meaner, or more dangerous. Thus did God do *England* a good turn, although it was made for the present thereby, neither so rich or populous as it might have been in a time of Peace. This *French* heat wasted many a tumultuous Spirit, and ennobled the Fame of the King and Lords; not only abroad, but won them much Honour and Repute of those that remained at home; and so by congregating Homogeneals, and severing Heterogeneals, rendred the body of the people more Univocal; which tended much to the settling of the Joints of this distracted Nation. A timely birth hereof, doubtless, was the peaceable entry of *Richard* the Second upon the Throne, and quiet sitting there; whilst as yet he was but a Child, the Princes of the blood many; and they of generous, active, and daring Spirits; yet do we not meet with a whisper in story of any turbulent or aspiring humour in them or the people, during those tenderer times of that King's Reign. But after that he came to know more in himself than was to be found; and to outreach his abilities, having some of the Lords ready at his Elbow to help him, these changed the King's course, although the general part of that noble Band kept still their Array; and retaining the body of the people in due composure, thereby declared themselves to be the King's Friends, though the others were *Richard's* Favourites; so as he was fain to stoop to occasion, and submit to be a King, that would have otherwise been more or less. And thus the Lords were become Supporters to the Throne, Studds to the Crown, and a Reserve to the People, against the violent motions of an unbridled mind in their King; who seeing them so united, and endeavouring to break them into parties to obtain his desire, lost both it and himself. It is a degree of cleanly modesty, to impute the miscarriages of unruly Kings, to their Council. For however during their minority, Counsellors are more rightly Officers of State; yet when Kings will be their own men, their Counsellors are no other than the breath of the King's own breast; and by which a King may be more truly discerned, than any man by his Bosom-friends. *Edward* the Third was a man of a publick Spirit, and had a Council suitable to his aim. *Richard* the Second, a man that desired what him pleased, would have what he desired; and a Council he had that served him in all. For God answers the desires of mens hearts in Judgment as well as in Mercy; And a fore Judgment it is, both to King and People, when the corrupt Desires of the King are backed by a flattering Council.

It must be granted, that the Privy Council of Kings hath been an old
Ginn

Ginn * of State, that at a sudden lift could do much to the furthering of the pre-^{Engine.} sent estate of publick Affairs. Nevertheless, through the Riot of Kings, their designs generally tended to make more work for the Parliament, than to dispatch; to do much, rather than well; like works for sale, rather than for Master-piece, and sometimes to undermine, yea to out-face the Parliament itself, like some unruly Servants that will put away their own Masters. Nor can it otherwise be expected, unless the King's *elected ones* be turned into the Parliament's Committee; or that constant annual Inquisition by Parliament be made into their actions: for occasional inquiries breed ill blood, though no attainder be; nor are they easily undertaken; whereas constancy in such cases makes the worst to be resolved but into a matter of common course.

The natural and original power of the *Privy-Council* is very obscure, because there are several degrees of them that occasionally have been used, all of whom may deserve the name of *Privy-Council*, in regard of the Parliament, which is the most *publick Council* of all the rest, and always hath a general interest in all Causes in the Kingdom.

The first of these, is that which was called *The Grand Council of the King*, which, as I think, was not the House of Lords, who are called by Summons, and were only to attend during the Parliament; but a body made up of them, and other wise men of his own Retinue: And of this, it seems, there was a constant body framed, that were sworn to that Service; for some in these times were sworn both of the *Grand Council* and the *Privy Council*, and so entered upon Record.

The second of these Councils was also a great Council, and probably greater than the other; but this was called only upon occasion, and consisted of all sorts, like a Parliament, yet was none. An example whereof we have in the Ordinances concerning the Staple, which at the first were made by the King, Prelates, Dukes, Earls, Lords, and Great Men of the Kingdom, one out of every County, City, and Burrough, called together for that end; their results were but as in point of trial for six Months space, and then were turned into a Statute-law by the Parliament. These two are *Magna Concilia*, yet without power, further than as for advice; because they had no ancient foundation, nor constant continuance. Another Council remaineth more private than the other, of more continual use, though not so legally founded; and this is called the King's *Privy Council*, not taking up a whole House, but only a Chamber, or a Table; signifying rather communication of Advice, than power of Judicature, which more properly is *in Banco*. And yet the power of this grew as *virile* and *Royal*, as it would acknowledge no *Peer* but the Parliament, and usurped (to be) the *representative* of it, as that had been of the whole Kingdom. The ambition thereof hath ever been great, and in this most notoriously evident, that as it had swallowed up the *Grand Council* of Lords, so it seldom can endure the mention of a Parliament, but when Kings or Affairs are too rugged for their own touch. The Platform of their power you may behold in this their Oath.

1. That well and lawfully they shall counsel the King according to their best care and power, and keep well and lawfully his Counsels.
2. That none of them shall accuse each other of any thing which he had spoken in Council.

3. And that their lawful Power, Aid, and Counsel, they shall with their utmost diligence apply to the King's Rights.

4. And the Crown to guard, and maintain, save, and to keep off, from it, where they can without doing wrong.

5. And where they shall know of the things belonging to the Crown, or the Rights of the King, to be concealed, intruded upon, or subtracted, they shall reveal the same to the King.

6. And they shall enlarge the Crown, so far as lawfully they may, and shall not accounsel the King in decreasing the Rights of the Crown, so far as they lawfully may.

7. And they shall let for no Man (neither for love nor hate, nor for peace nor strife) to do their utmost (as far as they can, or do understand) unto every man, in every Estate, Right, and Reason; and in Judgment, and doing right, shall spare none neither for Riches nor Poverty.

8. And shall take of no Man without the King's leave, unless Meat or Drink in their Journey.

9. And if they be bound by Oath formerly taken, so as they cannot perform this without breaking that, they shall inform the King, and hereafter shall take no such Oaths without the King's consent first had.

** i. e. his Legal Government.* All which in a shorter sum, sounds in effect, that they must be faithful Counsellors to the King's Person, and also to his Crown*; nor to decrease the true Rights, but to enlarge them; yet all must be done lawfully. And secondly, that they shall do Right in Judgment, to take no Fees nor any other Oath in prejudice of this.

The first of these concerns the publick only at a distance; and yet the point of increasing and diminishing of the Crown in the sixth Section is captious, and may sound as if there is a legal enlarging of the Crown, whereof he that takes the Oath is to judge. A matter which only and properly concerns the Parliament to order and determine; or else farewell all liberty of the people of England.

The second concerneth immediately the King in his politick capacity, but trencheth upon all Laws of the Kingdom, in the executive power; and all the motions in the whole Kingdom, either of Peace or War, following in the Rear, either immediately, or mediately, are under this notion interested into the transaction of the Privy-Council, to debate and determine the Judgment therein, unless it will determine alone. And how easy a thing it is for such as have power of determining the Action by the Law, to slip into the determining of a Law upon the Action, and so to rule by Proclamation, experience has taught succeeding times sufficiently. Nevertheless, in these times Parliaments were every moment upon the wing, and kept this Noble Band in awe, by taking them into their Cognizance, placing and displacing some or all of them, directing and binding them by Oath, as they saw

Co. Jan. 4.
2. 2
27. 19. 18.

12. The Pichidi-
13. Rich. n.
14. 15.

22 Aff. pl. ca.

41 E. 3.
Rot. Claus.
16 Rich. 2.
Mem. 11. in
Dorf.
Fleta, lib. 2.
cap. 34.

38 E. Rot.
rat. Pf. 1.
Memb. 13.
39 E. 3. Pf. 1.
M. 13.
12. E. 3.
Rot. claus.
Memb. 8. in
Dorf.
2 Rich. 2.
Rot Pat (Pf. 1.
12. Rich. 2.
cap. 12. 43.
Aif. Pl. 38.

being depending at the Common-Law, the Archbishop in opposition to the Jurisdiction, sueth before the *King's Council*; and the proceedings at the Law are thereby stayed. And no wonder; for the *Council-Table* challenged to hold the ballance of all Courts of Law within their own Order: and so if any doubt concerning the Jurisdiction depended, the *Council-Table* gave the word, and all stooped thereunto. But enough of the Subject-matter; the manner follows: a new form of Process is taken up, that the Common-Law and ancient Custom never knew; and which grew so noisom to the people, that complaints are made thereof as of a common grievance, and remedies are thereto applied by the Laws of these times. For whereas by the *Grand Charter* nothing could be done in judgment, but according to the Laws of the Land; and in affirmance thereof, a Law was made in these times, that no Accusation, nor Attachment, nor forejudging of Life or Member, nor seizure of Lands, Tenements, Goods or Chattles, should be against the form of the *Grand Charter*, and Law of the Land: This course of affairs grew so stale, that amongst other innovations, a trick of a new kind of Trial is brought forth, by suggestions upon *Articles* exhibited against any man before the *Council-Table*; and thereupon issued forth *Attachments* against the party complained of; by means whereof, and other courses, (for they could also sequester) much vexation arose unto the people. Hereunto, upon complaints multiplied, a remedial Law is made; whereby it is Enacted, that all such suggestions made, shall be carried to the Chancellor, Treasurer, and the King's Grand Council; and the informer shall find Surety to prosecute with effect; and to incur the like penalty intended for the Defendant, if the Plaintiffs proofs be not compleat: and then the Process of the Law shall issue forth, and the Defendant shall not be taken against the form of the *Great Charter*; that is, he shall not be taken until first the fault appear upon Record, by *Presentment*, or by *due Process*, or by *original Writ*, according to the ancient Law of the Kingdom. Either therefore the *Privy-Council* had no power to hold any Pleas at all, or else no power of Trial. The first of these was concluded in open Parliament; and the second as good as so: for if the first, then the second will come on undeniably. But suppose all this be given up, yet was this Liberty to hold Pleas so qualified, that the person could not be touched, till the thing did appear by Inquisition; and then in a legal way. Such proceeding was had upon suggestion made against the City of London, in Henry the Third's time: for one of the Judges was first sent into the City to find the suggestion by a Jury; and then the Lord Mayor appeared before the Lords, and traversed the matter, and in a manner *appealed*, or rather demanded to be tried according to the custom of the City. And the like course do we find observed in our *Law-Reports* of these times, in a case concerning the price of Wool, by a false Report. The foot of the whole account will be this; That the work of Judicature of the *Privy-Council* in these times in cases of Crimes, was to receive *Articles*, and award Inquisitions; and after return in nature of a Grand Inquest, to Recover, Traverse, and to order Trial at the Common-Law; and upon Verdict returned, to Fine and Ransom. In other Cases either of Right or Equity in matters of private property, they were determined either by Judges of the *Bench*, or *Chancery*, although possibly the suit was *Coram Concilio*, for that all the said Judges were of the *King's Council*. And yet as I dare not affirm, so I cannot deny, but it might also be possible that some matters, especially these of a greater consequence, either in their own nature,

ture, or in regard of the persons whom they concerned, were determined by the major Vote of the *whole Council*, in a prudential, or rather arbitrary way. But this was, *Invita Minerva*, and used so rarely, as the path is grown out of view, saving some few footsteps here and there remaining, which shew that the *Grand Council of Lords* had been there.

C H A P. IV.

Of the Chancery.

IT is the birth of the King's power in Judicature, and may deserve the name of the first born. For though it had no better Title in these later times than *Officium*, because amongst other of the King's Escripts, it formed *Writs Remedial*, for such as had received wrong; yet even by that work, it was in repute for so much skill in the Law of the Land, that by the consent of all, it was as well able to advise a remedy, as to advise the Complainants where to have it. And yet it had one advantage further, that it was an *Office of remembrance* to the King, by his *Chancellor* (who is a person of great trust in the Law, and gave such credit to all acts done before him) as being entered into the *remembrance*, became of the highest nature of *Record*, against which no *Plea* did lie. Amongst these, matters of debt and contract coming into the account, this *Office* taking notice of the *Record*, took cognizance of the thing, and for the executing thereof: and thus in these, and such-like Cases, granted *Judicial Writs*, and so found out a way of Judicature, to as many Causes as the State would trust it with. And because it pretended cognizance only of matters of *Record* before them, they found out a way of examining of Witnesses by Commission and returning their Depositions in writing; which being become a *Record* before them, they gave their Sentence upon the whole matter, without the antient ordinary Trial *per pares*. It soon becomes a kind of *Peculiar*, exempting it self from the ordinary course in manner of Trial, and from the ordinary rules of Law, in giving of Sentence; and is as a Back-door for the King's Arbitrary, in case of Judicature in matters of *Common Pleas*; as the *Council-Table* was in *Crown-Pleas*. They both are looked upon with a very pleasing eye of Majesty, which loves not to be strait-laced; yet all is embattled under the Colours of *Equity*, *Honour*, *Conveniency*, and *Conscience*; like a *Monopoly*, that is bred under the wings of the *publick*, but feeds it self upon it.

Mirror. c. 4.
Sect. 2.
Fleta, lib. 2.
cap. 13.

Fleta, lib. 2.
c. 13. Sect. 8.

Instit. 4. c.
18. fol. 78.

That this had attained the Title of a *Court* so anciently as in King *Steven's* time (as the Honourable Reporter noteth) I much question, by the Title that *Fleta* gives it in later times; nor, under his favour, will that Testimony cited out of the History of *Ely* warrant it, but upon a mistaken ground of misplacing the note of distinction. For I take the words to be thus, translated: King *Etheldred* determined and granted, that the Church of *Ely* should for ever in the King's Court hold the dignity of the Chancery, and not hold the dignity of the King's Court of Chancery. Nevertheless, it is clear that these times brought it to that condition, that it might well carry that name, if formerly it had not: For it grew very fast both in honour and power; and this not by Usurpation, (though it did exceed) but by express donation from the Parliament.

Yet is this power much darkned in the limits and extent thereof, chiefly in regard that the *Chancellor* is entrusted with many things, whereof there is no evidence

*. Keeper of
the King's
Conscience,
&c.

4 E. 3. c. 12.
9 E. 3. c. 1.
14 E. 3. c. 5.

27 E. 3. c. 26.
36 E. 3. c. 9.
& c. 13.

12 R. 2. c. 12.
27 E. 3. c. 24.

22 Aff. pl. 25.

Bro. Scire fac.
154.

24 E. 3. 73.

43 Aff. pl. 32.
24 E. pl. 35.

39 E. 3. fo. 14.
21 E. 3. fo.
47.

43 Aff. pl. 35.

evidence for the Chancery to claim any cognizance. For he was in these times a person of many interests and relations, being one of the *Quorum* in the Star-Chamber, of the King's Council, chief in the Chancery*, most commonly a Clergyman, and therewith Legate *à Latere*; and in these several Relations might act directly, and yet in several Courts. And therefore, though he had power with others, to punish neglects of Execution of the Statutes of *Wines*, by act of Parliament; and also of the Statute concerning *Viſuals*, and to determine matters of controversy between parties in Cases depending before the Parliament, and in some matters that concern the King's Revenue; yet cannot these be said to be the proper work belonging to the cognizance of the Chancery, but to the Chancellor by special Commission in another Relation. Albeit, I cannot deny but the Court itself had cognizance in matters of as strange a nature, viz. To punish disturbances of Merchants in their Trade, to see to the executing of the Statutes of Purveyors, and to remedy Grievances contrary to other Statutes: Which general words let in a wild liberty to that Court to intermeddle in Laws which were never intended for their touch; to punish Nuisances according to discretion, to give remedy to Merchants upon the Statute of Staple; so that it is clear enough the Parliament intended it should be a Court, and gave their Seal to their power of Judicature. Nor as it seemeth, was this any regret to the Courts of Common-Law, but as a thing taken for granted. For the Reports tell us, That if the King grants Tythes, arising from without the bounds of any Parish†, the Patentee shall sue in the Chancery by *Scire Facias*, and shall there proceed to Issue or Demurrer; and then to the Common Law; where, upon Trial, if the Defendant make default, the Plaintiff shall have Judgment and Execution. And if the Heir be in Ward to the King, the Mother shall sue and recover her Dower in the Chancery. And they tell us, that it had power to prohibit Spiritual Courts and Courts of Common-Law, yea, to over-rule or reverse Judgments: and yet the Common-Law held its ground when it was concerned; for neither were all suits there by Bill, as in cases of Equity, nor determined according to such rules; nor did the power of Judicature rest in the breast of one Chancellor, but in him jointly with other Council of the King, which were also learned Judges of the Law. For the Report informeth that Edward the Second had granted a Rent in Tail to the Earl of Kent, who dying, his Son under age, and Ward to the King, Edward the Third seized, amongst other Lands, the Rent, and granted it to Sir John Molins: Upon Petition, the King refers the matter to the Archbishop, and others of the Council, calling to them the Chancellor. A *Scire Facias* goes forth to Sir John Molins; he upon appearance pleaded to the jurisdiction, as a case belonging to the Common-Law; but it would not be allowed, because it was to repeal the King's Charter.

And whereas it was objected, that the reference was to the Archbishop and others, and therefore the cause ought not to be determined in the Chancery; it was resolved that it did properly belong to the Chancery, by the Law: And in the argument of the case, it appears clearly that the King's Council there, were learned in the Law. And the same is yet more evident by the Title of Bills in those days exhibited in the Chancery, which was directed, To the Chancellor and the King's Council; and the Rule given *Per tout les Justices*. Which I rather note, for the shortness of the form of Bills in those days, far different from these times, wherein the substance of the complaint, however small in it self, is oftentimes blown

† For the Division of the Kingdom by Parishes, was an invention of the Pope and Clergy.

blown out into so great a bubble, that it breaks to nothing: And the Statutes formerly mentioned do assert the same thing, as touching the *King's Council*. For though they speak of the Council or *Chancery* in the *English Tongue*, yet in the original the words are, *Conceil en Chancery*.

Having thus touched upon the matters under the Judicatory of the *Chancery*, and Judges in the same; in the next place, the manner of proceedings comes to consideration. For it seems they had been formerly very irregular; and that contrary to the *Grand Charter*, upon a bare suggestion in the *Chancery*, the party complained of was imprisoned, and no proceedings made thereupon. For remedy whereof, it was ordained, That upon suggestions so made, the Complainant was to find Sureties to pursue the Suggestions; and that the Process of Law should issue forth against the party without imprisoning him; and that if the Suggestions were not proved true, the Complainant should incur the like penalty that the Defendant should have done, in case he had been found Guilty. But afterwards this later Clause^{37 E. 3. c. 17.} was altered by another Statute, because it was full of uncertainty; and it was ordained, that in such case the Complainant shall be imprisoned, until he shall satisfy^{38 E. 3. c. 9.} the Defendant of his Damages; and furthermore, shall make Fine and Ransom to the King. But because that the Defendant many times held his advantage, even to extremity, this course lasted not long; but a new Law was made, which put the power of awarding Damages in such cases into the *Chancellor*, to do according^{17 Rich. 2. c.} to his discretion. And thus the *Chancery* obtained power to award Damages, which^{6.} they never had formerly; and the *Chancellor* a Precedency both in the *Chancery*,^{43 Aff. pl.} and of the Council in the Court of *Star-Chamber*, and in many cases in the *Exchequer*.^{32.} By the first he had a power in matters of *Meum* and *Tuum*; by the last, in matters *Mei* and *Regis*; and by the other, in matters *Mei* and *Regni*. A considerable man certainly he was in the motions of Government; but how much more, if he be made Archbishop of *Canterbury*, Cardinal, and Legate à *Latere*; or Archbishop, Lord *Treasurer*, and Legate à *Latere*; as these days had divers times seen? Extraordinary advancements bestowed upon the Nobility, brings Honour to the Throne; but if they be not Men of noted Worth and Uprightness, they make the Scepter stoop, by stirring up envy in the Nobility, and indignation from the people. For seldom it is seen, that Advancements are fed from the Crown; though they be bred from thence; but either maintained by new supplies from the people's Purses, or the ruin or decay of some Officers more ancient than themselves, or both. And such was the condition of the *Chancellor*; he sucked Fat from beneath, and Blood and Spirits from the Grand Chief Justiciar of *England*, and so reduced that Honourable Potentate unto the degree of Chief Justice of the *King's Bench*, leaving scarcely unto him the Name or Title of *Lord*. One thing more remaineth, touching the election or nomination of this great Man. At the first, he was no better than a *Register*, or the King's Remembrancer, or Secretary, having also the Honour to advise the King in such matters as came within the circuit of the Writings in his custody; and questionless, *Eo usque*, it is suitable to all the reason in the World, that he should be of the King's sole Nomination and Election. But when it befalls, that instead of advising the King, his word is taken to be the Rule; and a Judicatory power put upon that; and unto this is superadded that honourable trust of keeping and governing the *Great Seal* of the Kingdom, with the
conti-

15 E. 3. n.
10. 15.
15 E. 3. c. 3.
10 Rich. 2.
n. 16 10.

continual growing power occasionally conferred upon him by the Parliament *. He is now become no more the King's Remembrancer, but the Lord Chancellor of England, and Supreme Officer of State. And it seems but reasonable that he should hold his place by publick Election, as well as the Grand Justiciar (whose Plumes he borrowed) and other Grand Officers of State did before him. For he that will have his Servant to work for another, must give the other that Honour of Electing him thereto; nor was this laid aside nor forgotten in these times, but a claim was put in for the Election or allowance of this principal Officer amongst others; the Parliament obtaining a Judgment in the case by the King's Confession; and so the thing is left to the judgment of future ages, viz. Whether a King that can do no man wrong, can dissemble the Royal Assent in Parliament; or declare himself legally in that manner by Proclamation?

C H A P. V.

Of the Admiral's Court †.

THIS is a third Court that maintained the King's Judicatory power in a different way from that which is commonly called the Common-Law; and by many is therefore supposed to advance the King's Prerogative, but upon mistaken grounds. It is very true, that the way is different from the common Road, both in its original, and in the course of proceedings; nor could it otherwise be, considering the condition of the Nations, and the people of the same, interested in common Traffique. The people thus interested, as much differed from the other sort of Dry-men (if they may be so called) as Sea from Land, and are in nature but as March-men of several Nations, that must centre in some third way for the maintenance of Commerce for peace-sake, and to the end that no Nation may be under any other Law than its own. The condition of the Nations in the times when civilized Government began to settle amongst them, was to be under the Roman Emperors, who having settled one Law in the general grounds throughout all Nations, made the Sea likewise to serve under one rule, which should float up and down with it, that men might know upon what terms they held their own, wheresoever they went; and upon what terms to part with it for their best advantage. In its original therefore, this Law may be called Imperial, and likewise in the Process, because it was directed in one way of Trial, and by one Law, which had its first birth from the Imperial power; and probably it had not been for the common benefit of Europe to have been otherwise, at other time, or by other directories formed. Nevertheless, this became no Gem of Prerogative to the English Crown; for if England did comply with foreign Natives for its own benefit (it being an Island full of the Sea, and in the common Road from the most parts of Europe that border upon the Sea, and of delight in Merchandise) it is but suitable to its self: and it did so comply, as it saved the main Stake, by voluntary entertaining those Laws without being imposed upon by Imperial power. For the Saxons came into this Kingdom

* Note, it appears from *Matt. Paris*, the *Mirror of Justices*, &c. That both the Chancellor and other Great Officers of State were originally eligible by the Parliament.

† This Court seems to have been founded on the King's Prerogative of Maritime Dominion, exclusive of the common Law, which extended its cognizance only to matters transacted on Land.

Kingdom a free people, and so (for aught yet appeareth to me) continueth to this day: I say, that in those first times, they did take into the consideration of Parliament the regulating of the fluctuating motions of Sea-Laws: nor were they then, or after, properly imposed by the King's Edict. For though it were granted, that *Richard* the First reduced the Sea-Laws in the Isle of *Oleron*, yet that the same should be done without advice of Parliament in his return from the *Holy Land*, is to me a Riddle, considering what Histories do hold forth concerning his return through *Germany*; nor can that be good evidence to entitle the Kings of *England* to a power to make and alter Laws according to their private pleasure and interest. Nor doth that Record mentioned in the *Institutes*, warrant any such matter, but rather on the contrary groundeth the complaint upon Laws, Statutes, Franchises, and Customs, established; and that this Establishment was by the King and the Council.

Instit. 4. cap. 22. fol. 142. & 144.

This Law was of a double nature, according to the Law of the Land; one part concerning the *Pleas of the Crown*, and the other between party and party; for properly the King's Authority in the Admiralty is but an Authority of Judicature, according to Laws established, which both for process and sentence are different from the Common-Law, as much as the two Elements do differ, yet not different in the power that made them. I shall leave the particulars to be enquired into, by them that shall mind it elsewhere, and only touch so much as shall reflect upon the main Government. This power was executed by Deputies diversly, according as the times and opportunities were, for War or Peace, and either *transitu* or *portu*. What was done in time of War, or whilst the Ship is out of the *English* Seas, comes not to our purpose; and therefore I shall not meddle with that, further than this, that in the first times Kings were wont to divide the work of Judicature and of War into several hands. The power of War and Peace they committed unto men of approved Courage and Skill in that service; and therefore generally, not to the men of highest rank, who had neither Mind nor skill for a work of such labour, diet and danger. This power passed under divers names; sometimes by grant of the custody of the *Sea-coasts*, sometimes of the *ports* and *Sea-coasts*, sometimes by being made *Captain of the Sea-men* and *Mariners*, and sometimes *Admiral* of the Ships. It was a great power, and had been much greater, but that it suffered a double diminution; the one in the time, for three or four years commonly made an end of the command of one man, and at the best it was, *quam diu Regi placuerit*: the other diminution was in circuit of the power, for all the Maritime Coasts were not ordinarily under the power of one man, but of many; each having his proper precinct upon the *South* or *North*, *East* or *Western* shores; and under the Title of *Admiral* in the times of *Edward* the First, and forwards, who brought that Title from the *Holy Land**. Nevertheless, about the end of the times whereof we now treat, the custody of the whole Sea began to settle in one hand, under the Title of *Admiral* of the *English* Seas; and the place was conferred upon men of the greatest rank, and so continued ever afterward. The power of Jurisdiction or Judicature all this while remained distinct, and it seems was settled in part in the power of the *Sheriff* and *Justices*. For by the Law the *Sheriff* and *Justices* had cognizance of matters between the *high-water* and the *low-water mark*; and what was done *super altum mare*, was within the directory of the *Admiral*; these were but few things, and of small consideration: the principal of them being concerning War

G. off. fol. 16.
* Being derived from the Arabic, *Emir*, i. e. Great or High Lord.

or Peace, and those only within the *English* Seas. But after *Edward* the Third had beaten both the *French* and *Spaniards* at Sea, the People grew much more towards the Sea, and became so famous, that the greatest Lords thought the Regiment of Sea-affairs worthy of the best of their Rank, and were pleased with the Title of *Admiral*, whilst they left the work to others; and so the *Admiral* became a person of more honour and less work than he had been formerly. The greatness of the honour of this place thus growing, soon also began to contract greatness of power beyond what it had formerly; and this was principally in matter of Jurisdiction. For not contented with the power of a *Chief Justice* of War and Peace within the Seas, which was his proper dominion, the *Lord Admiral* gained the same within the *low-water mark*, and in the *main streams* below the next Bridge to the Sea, and in all places where *Kiddels* were set; and yet these places were within the body of the County. Nor did he endeavour less to gain in matters of distributive Justice: for although he had a legal Jurisdiction in things done upon the Sea, so far as to defend, order, determine, and cause restitution to be made, in cases of damage done unjustly; yet was it no less difficult to keep this power within its own bounds, than the watery Element upon which it floated; but it made continual waves upon the *Franchise* of the Land; and for this cause, no sooner had these great men favoured of the Honour and Authority of that Dignity, but comes a Statute to restrain their Authority in the Cognizance of Cases, only unto such matters as are done upon the *main Sea*, as formerly was wont to be. And within two years after, that Act of Parliament is backed by another Act to the same purpose, in more full expressions, saving that for Manslaughter, the *Admiral's* power extended even to the *high-water mark*, and into the *main streams*. And this leadeth on the next consideration, *viz.* What is the subject matter of this Jurisdiction and Authority. I shall not enter into the depth of particulars, but shall reduce all to the two heads of *Peace* and *Justice*.

The *Lord Admiral* is, as I formerly said, a *Justice of Peace* at Sea, maintaining the *Peace* by power, and restoring the *Peace* by setting an Order unto matters of Difference, as well between Foreigners, as between the *English* and Foreigners; as may appear by that Plea in the fourth Institutes formerly mentioned.

Secondly, That point of *Justice* principally concerneth matters of Contract, and Complaints for breach of Contract; of these the *Admiral* is the Judge, to determine according to Law and Custom. Now as subservient unto both these, he hath Authority of command over Sea-men, and Ships that belong to the State, and over all Seamen and Ships, in order to the service of the State, to arrest and order them for the great voyages of the King and Realm, and during the said voyage; but this he cannot do without express Order, because the determining of a *Voyage Royal*, is not wholly in his power.

Lastly, the *Lord Admiral* hath power, not only over the Seamen serving in the Ships of State; but over all other Seamen, to arrest them for the service of the State; and if any of them run away without leave from the *Admiral*, or power deputed from him, he hath power by enquiry to make a Record thereof, and certify the same to the Sheriffs, Mayors, Bailiffs, &c. who shall cause them to be apprehended and imprisoned. By all which, and divers other Laws, not only the power of the *Admiral* is declared, but the original from whence it is

is derived, namely from the *Legislative Power* of the Parliament, and not from the *single Person* of the King, or any other Council whatsoever. But enough hath been already said of these Courts of State, in their particular precincts. One general interest befalls them all: That as they are led by a Law much different from the Courts of Common-Law, so are they thereby the more endeared to King's, as being subservient to their Prerogative, no less than the Common-Law is to the People's liberty. In which condition being looked upon as Corrivals, this principal maxim of Government will thence arise, That the bounds of these several Laws are so to be regarded, that not the least gap of intrenchment be laid open each to other; lest the Fence once broken, Prerogative or Liberty should become boundless, and bring in Confusion instead of Law.

C H A P. VI.

*Of the Church-men's * Interest.*

* Vide post
ch. 17, 29, &
30.

BUT the Church-men's † interest [and power] was yet more tart, standing in need of no less allay, than that of the King's Authority, for that the King is no less concerned therein, than the People; and the rather, because it was now grown to that pitch, that it is become the Darling of King's; and continually henceforth courted by them; either to gain them from the *Papal Jurisdiction*, to be more engaged to the Crown; or by their means to gain the Papal Jurisdiction to be more favourable and complying with the *Prerogative Royal*. The former times were tumultuous, and the Pope is gained to join with the Crown to keep the people under; though by that means, *what the Crown saved [gain'd] to it self from the People, it lost to Rome*. Henceforth the course of Affairs grew more civil, or (if you will) graced with a blush of Religion: and it was the policy of these times whereof we now treat, to carry a benign Aspect to the Pope, so far only as to stave him off from being an enemy, whilst King's drove on a new design to ingratiate and engage the Church-men of their own Nation unto its own Crown. This they did by distinguishing the Office or Dignity of Episcopacy, into the Ministerial and honourable Parts; the latter they called *Prelacy*, and was superadded for encouragement of the former, and to make their work more acceptable to men for their Hospitalities sake; for the maintenance whereof, they had large Endowments and Advancements. And then they reduced them to a right understanding of their Original, which, they say, is neither *Jus Divinum*, nor *Romanum*,^{25 E. 3. Stat. 6.} but that their Lordships Power, and great possessions, were given them by the Kings, and others of this Realm. And that by virtue thereof, the Patronage and custody of the Possessions in the vacancy ought to belong to the Kings, and other the Founders; and that unto them the right of Election into such advancements doth belong, and not unto the Pope; nor could he gain other Title unto such power, but by usurpation, and encroachment upon the right of others. But these great men were not to be won by Syllogisms; Ordinarily they are begotten between Ambition and Covetousness, nourished by Riches, and Honour; and like the Needle in the Compass, turn ever after that way. *Edward the Third* there-

Kk 2

fore

† Who had now by various Artifices established their *Canon Law*, the Grand Engine of *Hierarchy* or *Spiritual Tyranny*.

fore labours to win these men, heaped Honour and Privileges upon them, that they might see the gleanings of the Crown of *England*, to be better than the vintage of the Triple Crown. Doubtless he was a Prince that knew how to set a full value upon *Church men*, especially such as were devout; and it may be, did somewhat outreach in that course: For though he saw God in outward events, more than any of his Predecessors; and disclaiming all human merits, reflected much upon God's mercy, even in smaller blessings: yet we find his Letters reflect very much upon the Prayers of his *Clergy*; he loved to have their Persons nigh unto him, put them into places of greatest Trust, for Honour and Power, in Judicature; and not altogether without cause; he had thereby purchased unto his Kingdom the name and repute of being a Kingdom of *Priests*. But all this is but Personal*, and may give some liking to the present Incumbents, but not to the Expectants: and therefore the Royal Favour extended so far in these times, as to bring on the Parliament to give countenance to the Courts and Judicatory Power of the Ordinaries, by the positive Law of the Kingdom, although formerly the Canons had already long since made way thereto by practice. I shall hereof note these few particulars ensuing.

* perhaps Political.

25 E. 3. c. 6. *Ordinaries shall not be questioned in the King's Court for Commutation, Testamentary Matters, or Matrimonial Causes, nor other things touching Jurisdiction of Holy Church.*

Things formerly bred by the Canon, nourished by continual practice, allowed by Ordinance of Parliament, or grant from Kings in Parliament, are now confirmed by solemn concurrence of the whole Representative Body of the Kingdom, to have and to hold with Warranty. And yet the sense is not so general as the words, nor doth it seem much other, than a Confection made for the Arch-bishop's appetite, to cure a distemper between him and the King: for the Civil Judge lost nothing hereby, nor would the Crown, as may appear by a Law of equal Authority with the former; for though an Executor or Administrator may cheat, yet it tells us, that Ordinaries only can oppress, and extort from dead men; and therefore in such cases doth provide remedy by enquiry, and Indictment before the King's Justices.

22 Aff. pl. 70.
45 E. 3. 24.
Fil. consultat.
5.
31 E. 3. c. 4.
25 E. 3. Stat.
3. cap. 9.

2 E. 53. c. 5. *They shall have Cognizance of Usury during the Delinquent's life, and the King after the Delinquent's death.*

Mirror. Just. c. 5. Sect. 1. The difference ariseth from the different end; the first being to reform the Person by *Church-censures*, and to urge him to restitution; the latter is for the King's Fine or Forfeiture. For as touching the Usurer's estate, the offence was in the nature of Felony, forfeiting both Lands and Goods to the King, after the Delinquent's death: and it seemeth the manner was to indict the Delinquent during his life; and that stuck to him as a deadly Arrow in his side, till he died. Nor did it lie in the power of the Ordinary, by Ecclesiastical censure, so to reform the Offender, as to clear him to the King, unless the party offending made his peace with the King by Composition. And thus the Law continued, for ought appeareth to me, till the time of *Henry the Eighth*.

51 H. 3. petit. overi. Artic. 26.
50 E. 3. n. 1, 8.
6 Rich. 2. n. 57.
4 Rich. 2. n. 24.
Instit. 3. c. 70.
6 E. 3. coram Rege. Rot. 230. Perff.

They shall have Cognizance of avoidance of Benefices of Right ; 25 E. 3. c. 8. pro clero.
They shall certify Bigamy ; and Bastardy had beyond the Sea ; and 18 E. 3. c. 2. 15 E. 3. Stat. 2.
whether a Prior be perpetual, or dative. 9 Rich. 2. c. 4.

The first of these concerning *avoidance of Churches*, it seemeth was somewhat doubtful in point of practice, for that the Civil Judge used to determine all manner of *avoidances*, as well in Fact, as of Right ; but by this Statute they are restrained only unto *avoidances* in Fact, so as after this Statute it is holden, that *avoidances* by death shall be tryed by the Country ; but if the *avoidance* be by Deprivation, Resignation, Creation, or otherwise, it shall be tryed by the Ordinary : because by common intendment he is more *conusant* of the thing, than Country-people. But as touching the point of *Bigamy*, the matter is more doubtful, in regard that commonly the Marriage of a second Wife, or Widow, is a matter in Fact, done in the face of the people ; and of which they take notice, especially where the life of man is concerned, which rather requireth the Judgment of his *Peers*, than where the outward maintenance only is engaged. Nevertheless, because the main point is, whether the party be a *Clerk* or not, and the same anciently rested upon the Certificate of the *Ordinary* ; it is by this Law again allowed to him to try and certify this point of *Bigamy* also, although the Statute of *Bigamists* might seem to entitle the Civil Magistrate thereto, as the Law was holden to be before this Statute was made. In the next place, although it cannot be denied but the Trial of *Bastardy*, beyond the Sea might as well lie in the cognizance of the Lay-Magistrate, as in that of the Ecclesiastical ; yet seeing the *Clergy* had already attained the cognizance of the thing, the place proved but a matter of circumstance ; especially they having the advantage of the Civil Magistrate in this, in regard that the Ecclesiastical Persons beyond the Sea, had also obtained the cognizance of that matter amongst themselves, Their Testimony or Certificate would come with more credit to the *Clergy* in this Kingdom, than to the civil Magistrate, whose cognizance in such cases they did disallow. 8 E. 3. c. 2. Bro. quar. imp. 85.

Lastly, concerning *Priories*, whereas some were *presentative*, and filled by Induction from the *Ordinary* ; and others were *Donative*, having their *Priors* meerly at the will of the *Abbot*, to be placed and displaced as he thought most expedient : If then the point in issue depends upon this knot, this Law referreth the Trial unto the *Ordinary*, who by common presumption best knows whether any Institution and Induction had passed his Registry and Seal, or not. And thus, though a kind of Judicial Power seemeth to be carried along herewith, yet it is all in a ministerial and subservient way unto the Civil Magistrate ; and nevertheless, with such credit and authority, that the main hinge of the Judicatory, in such cases, depends upon the dash of their pen.

No Bishop, nor Arch-bishop, shall be impeached before the Civil Magistrate, without the King's exprefs Warrant. 18 E. 3. c. 2.

The former particulars concerned matter of Authority ; this and others ensuing, concern matter of immunity, which, or most of which were formerly for a long time within the fancy of the Canon, but never came to the height of Parliamentary

mentary Approbation or Authority till now, that it comes in as a *peace-offering* to pacify the quarrel between the Arch-bishop *Stratford* and the King. For he being engaged in the *French Wars*, so resolved to continue; and therefore to maintain distempers at home, he held neither honourable nor safe.

14 E. 3. c. 2. *Their Temporalities shall not be wasted, during the vacancy: Nor shall they be seized, but by Judgment of the Court.*

The first of these was an ancient Law, grounded upon great reason; although dulled by time, and by covetousness of the needy Patrons, next to laid aside, if nor quite put out of countenance. So as a new Law must be made to revive it, and to abolish that corrupt custom or practice of depredating those possessions given to a *holy use* in common supposal, contrary to the trust by them undertaken, and the use still continuing. But the second Branch is in nature of a Law of Restraint set upon the Common-Law: for the persons of these spiritualized men were of so airy a constitution, as they could not be holden by hands made out of the Clay, such as the rude Laity were; and therefore the Civil Magistrate upon all occasions used to lay hold upon that, whereof there was some feeling, which were called *Temporalities*, and thereby drew them to appearance at the *Lay-Courts*, for however Spiritual the *Clergy* were, they would not easily part with their *Lay-Fees*. But now by this Law, the times are so attenuated, that the very *Temporalities* are made so spiritual, as not to be meddled with by the *Lay-Magistrate*, unless upon judgment first obtained against them. And suitably thereunto, within twelve years following, another Law was made more punctual, That their *Temporalities* should not be seized upon for contempts but that their *persons* should be seized: yet within twenty years after that, this Law begins to be out of countenance, and the Opinions of the Judges began to grow bold upon the ancient rule, that their *Temporalities* were Temporal, though their *Persons* were Spiritual; and that it was more dangerous to imprison the person of a Clergy-man, than to attach his possessions. And therefore they held, That if the *Ordinary* remove not the Incumbent when the King's Writ commands him so to do, his *Temporalities* should be seized. And if the *Ordinary* should certify one to be a *Clerk* which is none, the like course is to be taken.

31 E. 3. c. 11. *They shall depute the next and most lawful Friends of the Intestate to administer his Goods.*

The Statute at *Westminster* the second, having given formerly a kind of allowance that the *Ordinary* should be Administrator to the *Intestate*, so far as to answer the *Intestate's Debts*, lent him thereby an opportunity to possess himself of the whole, to all intents and purposes. Which being observed by the Parliament, by this Law they made way for Administration to fall through the hands of the *Ordinary* into the Lap of Administrators made by the Authority of the Parliament; but of the *Ordinary's* nomination, according to the Authority hereby to him given. These Administrators thus made, had a greater power than ever the *Ordinary* had, or could give. For though the *Ordinary* by the Statute at *Westminster* was bound

to pay the Debts of the Testator, yet could he never bring Action, as the Administrator to all intents by this Law is enabled to do. And though it be true that the Administrator is by this Law ordered to account to the *Ordinary*, yet doth not that entitle the *Ordinary* to any interest in the personal Estate; but only gives him a bare Authority to take the *account*, without any compulsory Power by Ecclesiastical Censures to enforce him thereto.

Secondly, it is such an *account* as is no Evidence in any Court of Record. And lastly, if upon the foot of the *account*, any arrear remained, or surplussage of Estate; the *Ordinary* could neither recover, nor order the same; because by the Law anciently, the next friends had the sole interest therein: and being by this Statute made Administrators, the whole power of ordering the Estate is vested in them.

To conclude, this Statute was made in favour, and for the ease of the *Ordinary*, if they would please so to take it, for they could get no benefit by executing the Administration in their own persons, if they intended to administer according to the Law.

The Persons of the Clergy are privileged from Arrests, during the Holy Actions of their Officiating. ^{5 E. 3. c. 5.}

This was plotted ever since *Anselm's* time; he and his Successors endeavoured by Constitution and Canon, continually to mind the Civil Magistrate thereof, but could never nurse it up to the degree of a Law till now; they gained the advantages of the times, growing into a more tender apprehension of Devotion than formerly. The penalty of transgressing this Law is left in general, and therefore did the less scare; but within three years after, it was confirmed with a certain penalty of Fine and Imprisonment, as to the King's suit; and damages to the party offended: and the Privilege was enlarged, for, and during their continuance in the *Consecrated Ground*, in order to such services, and not upon Fraud or Collusion to avoid Arrests. But by neither of these Laws was the *Arrest* (although contrary to them) made void, as touching the Process. ^{1 Rich. 2. c. 15.}

The Goods of the Clergy are discharged from Purveyance, and their Houses from Quarter. ^{14 E. 3. Stat. 3. cap. 1.}

The latter of these was an Encroachment upon the greater Clergymen. For under the Title of *Hospitality*, which the Prelates were obliged to by their great Possessions and revenues conferred upon them to that end, Kings used to quarter Messengers to and from *Scotland*; the King's Horses, Dogs, and Hawks, &c. But the point of *Purveyance* was an ancient Prerogative belonging to Kings; and by no Custom were the goods of any man discharged therefrom, till it was by Act of Grace first confirmed by *Edward the First*, and afterwards by grant of *Edward the Second*; yet by reason of the rudeness of the times, did not those Acts prevail to that settlement that was promised, till now *Edward the Third* renewed the Law. Nevertheless, could not this Law of *Edward the Third* perfect that work, because it was but a bare command till *Richard the Second* made a remedial Law, giving thereby the Clergy that were wronged a right of Action ^{1 Rich. 2. c. 3.} of Trespass against the *Purveyors*, and to recover treble damages; whereas formerly they were liable only to a Fine to the King, which many times was as soon pardoned as asked. These

These condescensions might have wedded the *English* Clergy to the *English* Crown, but that it was coy, and expected further gratuities. Besides, they beheld their old Step-dame *Rome* now in its full Splendor and Power, and deeply interested in the sway of affairs in this Kingdom; and above all the rest, the nigh affinity between the Prelate and the Pope was such that they sucked one Milk, breathed one Air, and like the Philosophers Twins, lived in each other. The latter of these was not discerned by those dim-sighted times, and therefore they could do nothing towards the dissolution of that knot, but left it to future times, who found no other way than to cut it asunder. But *Edward* the Third and his Successor espied the first, felt the inconvenience thereof, and applied themselves to such remedy as they found most ready at hand. All things that are subject to time, are also subject to change; which comes commonly slower upon Governments that are less Ecclesiastical: for Churches continue longer in a growing condition, than in their complete estate; like a *Christian**, that seldom endures long after his full ripeness. Thus in *England* it is hitherto above a thousand years since the Gospel came to the *Saxons*, and well nigh a thousand years since the Pope set his foot amongst us; ever approaching nigher the Throne, and ascending thereunto; but finding it full of a King that would not remove, he sits down in his Lap; a heavy burthen questionless he was, considering his claim of *Jurisdiction*, his *provisions*, *pensions*, *exemptions*, *impositions*, and such like oppressions, and therefore it is no wonder if the King feeling the incumbrance, gives a lift at the Pope's power, by stopping the current of Money from *England*, *Rome*-wards. To this end, the Statute made at *Carlisle* is revived, whereby the Clergy are inhibited from conveying Treasure beyond the Seas; but the Pope knew how to ride, and will not so easily forgo his saddle.

* He means, the Pear, so called.

4 E. 3. c. 6.
5 E. 3. c. 3.

Rot. Parl. 10.
E. 3. Arch.
Reg.
18 E. 3. tit.
38.
Fox. 388.
25 E. 3. Stat.
5. cap. 22.
Fox. Sect. 1.
17 E. 3. c. 1.

The *Roman* Ecclesiastical Eagle had made many a fair flight in *England*, and had not yet fully gorged himself; he grants ten thousand Marks yearly out of Taxes laid upon the Church-livings in *England* unto two *Cardinals*, neither of which did, nor by the Canon could live in *England*; the Treasurership of *York* also to another *Cardinal*, after that the King had conferred the same elsewhere. He proceeds also further to invade the undoubted rights of the Crown, by making an Election of the B. of *Norwich*, and causing him to be invested *Rege renitente*. The King spent eight Years in the recovery of his right, and was deluded in the conclusion: he now sees it bootless to stand always upon his defence, and receives affronts; he resolves therefore to enter the lists, and maketh seizure of the Deanery of *York*, which formerly by usurpation the Pope had conferred upon a *Cardinal*; and of all Church livings given by the Pope to Aliens. Then a Law is made more sharp than those in the eighteenth year, wherein *Provisors* of Abbeyes and Priories are made liable to a *Præmuniri*, and *Provisors* of other Ecclesiastical Livings and Dignities (whereby the presentation of the rightful Patron is disturbed) to be fined and imprisoned until the fine, and damages to the party wronged be paid. And all such as draw men to plead out of *England*, in cases that belong to the cognizance of the King's Court, and all obtainers of *provisions* in the Court at *Rome*, these were also subject to a *Præmuniri*. For whilst these things were thus in action, the Pope bestirred himself notably with *Citations*, *Excommunications*, *Interdictions*, and such other birds of prey, not only against mean men, but Judges, Bishops, and the King's Council; as amongst others, the case of the Bishop of *Ely*, at the solicitation of some

of some inferiour regard, as I remember, a Clerk or some such thing. Yet as these Bull-drivers or Summoners to the Romish Court, were no late upstarts, so Antiq. Brit. Eccles. 247. were not these times the first that took them to task: for before the Statutes of *Præmuniri*, we find provision was made against *Provisors*, and that some Statute did precede those in Print, which punished a disturber of the King's Incumbent by a Bull from *Rome*, with perpetual Imprisonment, or at the King's will. Besides, the party wronged was allowed an Action for his damages, *Qui tam pro Domino* 21 E. 3. fol. *Rege quam pro seipso sequitur.* And before that time also, bringers of Bulls from *Rome* were imprisoned; although in all these cases aforesaid, the liberty of the Persons, both of Lords and Prelates, was saved. And thus all the while King *Edward* the Third kept the Field, he gave the Pope cuff for cuff; but retiring 38 E. 3. c. 1. himself to take his ease, he waxing wanton, waxed weak, and more slowly pursued the vindication of his own Right, and his Subjects Liberty. The Laws are laid aside, and *Rome* had further day given to plead, and in the mean time Execution is staid: the double mind is double dyed, and advantage is soon espied; above sixty Church-livings more are suddenly caught and given to the Favourites at *Rome*. The Parliament rings herewith, yet the King delays the remedy; and in this Eddy Rot. Parl. 51. E. 3. ut. 35. of affairs *Edward* the Third dies, and *Richard* the Second takes up the place, who had wit enough to observe what concerned his own interest, and courage enough to pursue it: but neither wit nor courage to over-rule his Lusts, which in the conclusion over-ruled all rule, and brought himself to destruction. He found the People at his entrance into the Throne irritated with the Pope's oppressions, and vexed at his Grandfather's desidiousness; his spirit is also stirred within him, and 3 Rich. 2. c. himself thereby pressed to tread in his Grandfather's former ways, and to out-run 3 him in his latter. He made the penalty of *Præmuniri* to extend to all Farmers, 7 Rich. 2. c. or others, in nature of Bailiffs, that held any Church-maintenance to the use of 13 any Alien; and unto all Aliens that are Purchasers of such *Provisions* to any use; 12 Rich. 2. c. 15. and unto all *Lieges*, that shall in like manner purchase such *Provisions*.

But as touching such as shall accept such *Provisions*, he ordained Banishment for their Persons, and Forfeiture of their Estates: Notwithstanding all this, the 13 Rich. 2. Stat. cap. 21. *Roman* Horse-leech would not so give over. The King grew into displeasure with his Subjects, and they with him, and with one another; they see the Pope still on horseback, and fear that the *English* Clergy, their own Country-men, if not Friends and Abettors, yet are but faint and feigned Enemies to the Pope's Cause. Nor was it without cause that their fear was such; for as the Pope had two hands to receive, so they had two hearts, making shew of forming blows at the Pope, but then always at a distance, or when without the Pope's Guard; and thus the Laws begin to stammer, and cannot speak so plain *English* as they were wont. The people hereat offended, resolve to put the Clergy into the Van, and to try their mettle to the full.

At the last Parliament that *Richard* the Second did hold, both the Lords Temporal and Spiritual are opposed one by one. The Lords Temporal (like themselves) 16 Rich. 2. c. 5. resolve and enter their Resolutions to defend the Right of the Crown in the Cases of *Provisors*; although even amongst these great men, all were not equally resolute: For Sir *William Brian* had purchased the Pope's Excommunication against some that had committed Burglary, and he was committed to the *Tower* for his labour. Antiq. Brit. But the Prelates answer was ambiguous, and with modifications, which was all one

to cry (as men use to say) *Craven*: yet was the Statute made peremptory, according to what was formerly enacted. And though the Prelates cautionary way of proceeding might be a principal reason why the Pope's power held so long in *England*, in an usurping way; yet Kings also much conduced thereto, by seeking too much their personal ease above the honour of their place; and the Pope's blessings, and opinion of his favour, more than their own good, or the people's Liberty: for there was no other balm for a distracted mind, than that which dropped from the Pope's Lips. In like manner, *Richard* the Second being already, at least in purpose, estranged from his people, sought to get friends at *Rome*, to hold by the *Spiritual Sword*, what he was in danger to lose by laying aside the *Sword of Justice*, which is the surest Tenure for Kings to hold by. And though the Popedom was now
 Mich. 2. c. 7. under a *Schism* between two Popes, *Clement* and *Urban*, yet he was so far won for *Urban*, that he not only engaged himself, and the Parliament, to determine his Election, and uphold the same; but also, *Ex abundante*, did by Implication allow to him an Indefinite Power to grant *provisions*; and so at once he lost the Die, and gained a Stake, that like a bubble looked fair, but soon vanished away.

Astiq. Brit.
272.

Nevertheless, these two Comrades, whilst they were together, resolved to make the most of each other that they could; and therefore though the Popedom liked not the King, yet the Pope had his love so far, as he could deny himself; for he had already denied his Kingdom. And (if the Articles exhibited against the King by *Henry* the Fourth be true) the Pope had his Faith also: For (that he might be rid of his reputed Enemy, Archbishop *Arundel*) he trusted the Pope with that Compliment of making *Walden* Archbishop of *Canterbury* in *Arundel's* stead; which the Pope took so kindly, as he made it a Precedent for Provisors for the future. Nor did the King stick in this one Singular, but made it his custom in passing of Laws (especially such as the King was most devoted unto) to put more confidence in the Pope's *Amen*, than in all the Prayers of his *Commons*, with his own *Soit fait* to boot. The sum then will be, that the Prize was now well begun concerning the Pope's power in *England*. *Edward* the Third made a fair blow, and drew blood: *Richard* the Second seconded him, but both retired. The former left the Pope to lick himself whole; the latter gave him a Salve, and yet it proved a Gangrene in the conclusion.

The second means used to bring down the Power of the Pope in this Nation, was to abate the Power or height of the *English* Clergy. For though the times were not so clear as to espy the root of a Pope in Prelacy, yet experience had taught them that they were so nigh engaged that they would not part. And therefore, first, they let these men know that *Prelacy* was no *essential Member to the Government of the Kingdom*; but as there was a Government established before that rank was known, so there may be the like when it is gone: For *Edward* the Third being troubled with a quarrel between the two Archbishops of *Canterbury* and *York*, concerning Superiority in bearing the Cross, and the important affairs of *Scotland* so urging, summoned a Parliament at *York*, which was fain to be delayed and adjourned for want of appearance, and more effectual Summons issued forth. But at the day of *adjournment* none of the Clergy of the Province of *Canterbury* would be there: and upon this occasion the Parliament was not only interrupted in their proceedings, but an ill Precedent was made, for men to be bold with the King's Summons, in such Cases as liked not them; and thereupon a Statute was made

made to enforce Obedience upon Citizens and Burgesſes, and ſuch Eccleſiaſticks as held *per Baroniam*. Nevertheless, when the matters concerning *Proviſors* began to come upon the Stage, which was within two years after that Law was made, the Clergy found that matter too warm for them, and either did not obey the Summons, or come to the Parliament; or if they came, kept aloof; or if not ſo, would not *Vote*; or if that, yet order their Tongues ſo, as nothing was certainly to be gathered, but their doubtful or rather double mind. Theſe Prelates thus diſcovered, the Parliament depended no more upon them, further than they ſaw meet. And at fix or ſeven Parliaments *determined matters without their Advice*; and ſuch matters as croſſed the principles of theſe men, and therefore in a rational way might require their ſenſe above all the reſt, had they not been prepoſſeſſed with prejudice, and been parties in the matter. Nor did Edward the Third ever after hold their preſence at ſo high Repute at ſuch Meetings; and therefore ſummoned them, or ſo many of them, as he thought meet for the occaſion, ſometimes more, ſometimes fewer; and at a Parliament in his forty and ſeventh year, he ſummoned only four Biſhops, and five Abbots. And thus the matter in fact paſſed in theſe times, albeit the Clergy ſtill made their claim of *Vote*, and deſired the ſame to be entred upon Record.

And thus the Parliament of England tells all the World, that they bold themſelves compleat without the Clergy, and to all intents and purpoſes ſufficient to conclude matters concerning the Church, without their Concurrence. Thus began the Mewing time of Prelacy, and the principal Feather of their wings to fall away, having now flouriſhed in England nigh eight hundred years. And had future Ages purſued the flight as it was begun, theſe Lordlings might have beaten the air, without making any ſpeedy way, or great work, ſaving the noiſe.

A third ſtep yet was made further, in order to the reducing of the power of the Popedom in England, but which ſtumbled moſt immediately upon the greatneſs of the Prelates. For it was the condition of the Spiritual Powers beſides their height of Calling, to be ſet in high places, ſo as their Title was from Heaven; but their poſſeſſions were from Men, whereby they gained Lordſhip, Authority, and Power, by way of Appendix to their Spiritual Dignities. This addition, however it might pleaſe them, yet for a long time before now, it had been occaſion of ſuch murmur and grudge in the Commons againſt the Clergy, as though it advanced the Clergy for the preſent, yet it treaſured up a back-reckoning for theſe men, and made them liable to the diſpleaſure of the Laity, by ſeizure of their great places; whenas otherwiſe their Eccleſiaſtical Dignities had been beyond their reach. And of this, theſe times begin now to ſpeak louder than ever, not only by complaints made in Parliament by the people, but alſo by the Lords and Commons in Parliament to the King, That the Kingdom had been now long, and too long governed by the Clergy, to the diſheriſon of the Crown; and therefore prayed, that the principal Offices of the Kingdom might henceforth be executed by the Laity. And thus the ſtir aroſe between the Lords Temporal and Spiritual, each prevailing or loſing ground, as they had occaſion to lay the way open for them: The Duke of Lancaſter being ſtill upon the upper ground, that as little regarded the Pope's Curſe, as the Clergy loved him.

But the worſt, or rather the beſt, is yet behind: outward power, and honourable places, are but under-ſetters, or props to this Gourd of Prelacy, that might

15 E. 3. Stat.
3. cap. 6.

Antiq. Brit.
23. Co.

25 E. 3. Rot.
Parl. 22. n. 15.

prove no less prejudicial by creeping upon the ground, than by perking upward. For so long as Error abideth in the *Commons*, Truth can have little security amongst *Princes*; although it cannot be denied, but it is a good sign of a clear morning, when the Sun-rising glorieth upon the top of the Mountains. God gives commission therefore to a Worm, to smite this Gourd in the Root; and so at once both Prelate and Pope do wither by undermining. This was *Wickliff*, that had the double honour of Learning in *Human* and *Divine Mysteries*. The latter of which had for many years passed obscurely, as it were in a twilight amongst the meaner sort, who had no Endowments to hold it forth amongst the throng of Learned or great men of the world.

Vide ante,
P. 5.

And though the news thereof did sound much of *Holiness* and *Devotion*, Themes unmeet to be propounded to an age scarce civiliz'd: yet because divers of them were more immediately reflecting upon the policy of the Church, wherein all the greater sort of the Churchmen were much concerned, but the Pope above all the rest; the access of all the matter was made thereby more easy to the consideration of the great Lords and Princes in the Kingdom, who out of principles of State, were more deeply engaged against the Pope, than others of their Rank formerly had been. Duke *John* of *Gant* led the way in this Act, and had a party amongst the Nobility, that had never read the Canon-Law.

51 E. 3. c.
46, 47.

These held forth *Wickliff* and his Learning to the world; and *Edward* the Third himself favoured it well enough, but in his old Age desiring his ease, was contented to look on, whilst his Lords Temporal and Spiritual played their prize; yet giving his *plaudite* rather to his Son, than his Spiritual Fathers, as if led by principles of Nature, rather than Religion. This was the blossoming part of the *Wickliffists*; but the principal strength was from beneath, where the roots spread and fastned exceedingly, especially in the South and Eastern parts of this Kingdom. To tell of the *Usurpations of the Clergy*, the *Idolatry of their costly Worship*, the *Vanity of their curses*, &c. was exceeding welcome news to an oppressed multitude; especially where these things were rightly understood. The issue soon manifested itself to the world; no Parliament passed without reflections at *Prelates*, *Rome*, or some such thing; and not only the persons and practices of these men, but even their Laws and Canons were begun to be had in contempt, and their *Missives* slighted. And thus these men pretending patronage, both from a Right drawn from Heaven, and derived from men, must fail in their Evidence, unless the people do still believe more than they are able to understand.

Antiq. Brit.

No marvel if *Rome* be now roused, and that sort of men that formerly were Wolves in Sheeps cloathing, become now red and fiery Dragons, taking up a new course of establishing their power by persecution. This was a way of power indeed; but it is a touchy thing to have to do with fire, lest it get too high. It is therefore holden a point of discretion by the Prelates, not to meddle with the Lords or the common People; the former were too great, the latter too many; the one sort would not hear, the other would not understand: the Teachers, therefore being the *Velites*, at them they give fire. *Wickliff* their Leader comes on bravely, and notwithstanding they all made at him, he routs them, and in despite of them all comes off fairly, and dies in his bed by the course of nature. Then an Ordinance is levelled at the rest of the Teachers: this was made of an old Canon, the nature whereof was to this purpose.

That

That upon complaint of the Bishop, the King's Writ shall be granted to apprehend Preachers of Heresies, Errors, and matters of Slander, tending to Discord and Dissension between the States of this Realm, with their Factors and Abettors; and to imprison them till they be acquitted according to the Law of the Church.*

Rich. 2.
Stat. 2. c. 5.

This Law (for such it yet appears) gives occasion to consider of these particulars, viz. *The Crime, the Delinquents, the Manner of Inquisition, and the Penalty.* For the first, (not to trouble my way with Debate about the right of liberty of preaching) the matter in fact was, that men did publicly preach without Authority, matters of *Theology*, tending (as it is said) to *sow discord and dissension*; so as they are under consideration and censure of the Church-men and Canon-Law, in one regard; and of the Laws of the Kingdom and Civil Magistrates as disturbers of the peace, on the other side. And thus the Subjects Liberty is cast into a mysterious, cloudy, and doubtful posture, by matters of Opinion.

Secondly, the Persons *Delinquent* are also left to an indefinite Construction; for they are not only Preachers in publick, which might be an Order of Men within the Church-cognizance, as things then stood, in regard it was permitted to the Church to authorize men to preach; but also their *Factors* and *Abettors*, words that might comprehend any other person whatsoever, according to the passion or discretion of the Church-men.

Thirdly, the manner of this Inquisition must be *according to the Canon*, and then the people are at the Churchmen's mercy, to return complaints against whom they please, upon such grounds as they shall think meet. The persons that must make this Inquisition by this Law, are the *Ordinaries*, or any one of them; and for aught appears, the same might be done by *Pope, Council General, National, Provincial, Diocesan, or their Delegates, according to the Canon*: although the last precedent that I met with, was executed by a *Grand Council* of Lords and Prelates, in the time of *Henry the Second*. But now the *Clergy* finding the *Laity* began to swell against the *Canon*, they thought it high time to get the *Civil Sword* to join in the work, to be as their Hands to apprehend, and Gaolers to hold in custody, such as they should complain of, without any other Legal Conviction. Although hereby they not only disclaimed the exercising of their own power of Imprisoning, which they by the *Canon* formerly claimed to have in such cases, but also acknowledged to receive their Power Judicatory in such cases from the Parliament.

Thus was this Ordinance levelled, as I said, but the shot fell short; for this Law attained no further perfection than a meer shape, and was complained of by the Parliament, within few months after its first noise; *That it was made and published without the Commons consent or knowledge, and that the nature thereof was directly contrary to the Liberties of the People, and therefore they prayed that it might be repealed*; and the same was done accordingly; although the times have been such as would not suffer the same to come into the publick Book of Statutes in print.

6 Rich. 2.
Artic. 52.

* Note, This pretended Stat. seems to have been form'd by the artifice of Bishop Wickham (then Chancellor) and by him shuffled in amongst the Rolls of Parliament. See the Complaint of the Commons *infra*.

print. But whether Statute, or no Statute, they tell the King plainly, *That they will not further be bound or justified by the Prelates, than they or their Ancestors were anciently used to be*; and besides that, they thought somewhat more, which they laid up against future times; nor was it long ere they discovered it. For a Subsidy being offered to the King by the Laity, under a *Proviso, That the Clergy would grant a Tentb*; the Clergy took this Articulating of the Commons in snuff, and protested that the *Laity* should not charge them. The Commons hereat begin to bid battle to the Temporalities of the Clergy, and had not the King been a fast Friend in good earnest unto the Clergy, the Laity had won the Field. Thus were these times like the motion of the Ballance unto the Church-men, sometimes up, sometimes down; getting somewhat which they formerly had not, but with less assurance in what they had.

C H A P. VII.

Concerning Trade.

KINGS hitherto had lived upon the main stock, Improving the same to the utmost penny; few of them laid up for the future, much less endeavoured to advance the principal for their Successors.

There had now been Ten Kings of this Nation since the Conquest, all of them spending what they had, or could get from the people, in the maintenance of their Patrimony, or their own Lusts; if any over-plus was either gained by, or saved from the game, their Executors might be the better for it, their Heirs were not. But *Edward* the Third had a new game to play, he must gain his right by his Sword, or he must lose it: his Spirit was too big to sit still and bear blows; and yet pre-advising himself about the poverty of the people, and that their patience would be spent soon after their supplies, if they continually saw much going out, and nothing coming in; he had a rule upon his private expences, a good gloss upon the publick, and a platform for the augmenting of the Treasure of the Kingdom, as well for the benefit of the People as of the Crown. In order to the first, it is considerable, that the Royal Family was great and numerous above all his Predecessors; that besides the King and Queen, who were of a gallant and accomplish'd deportment, they had a Son, a Prince of as great renown as ever Prince had, and he also a Family suitable to his generosity; that they had other Children, every one like their Father, both for War and Peace; and that for the maintenance of all these, the expences must be in reason larger than formerly they were wont to be. Nevertheless, because *purveyance* for the King had already swelled so big, that all other oppressions seemed to be swallowed up into that one, the King to moderate the rigor thereof made nigh twenty Statutes, first excluding all servants at wages, and Horses and Dogs which were put to board with the Sheriffs; then reducing the *purveyance* only to the Families of himself, his Wife and Children, then to the Families of himself, the Queen, and Prince; and in the levy hereof, some mens Estates were absolutely privileged, and some kind of Goods, as Sheep before shearing, and Trees about the dwelling-house. Nor is the settling of the manner less considerable. It must be levied by Authority in writing under the Seal; and it must not be taken against the owners will, or upon malice; nor must be spared for reward; the price must be the same with the true Market-price, the measure

4 E. 3. c. 4.

14 E. 3. c. 19.

34 E. 3. c. 2.

36 E. 3. c. 2.

5. 6.

14 E. 3. c. 1.

24 E. 3. c. 6.

& 15.

4 E. 3. c. 4.

14 E. 3. c. 19.

36 E. 3. c. 3.

4 E. 3. c. 3.

28 E. 3. c. 12.

measure according to the common measure stricked, and the payment must be immediately, if the price be under twenty shillings; if above, it must be made in a quarter of a year; and no man must charge more carriage than is necessary. And thus was this wild Ivy of *Purveyance*, that like some kinds of Plants spreads over all, by rooting up and cutting down, brought into some kind of fashion; that if it did no good, it might do the less hurt unto the people.

Secondly, although it be true that *Edward* the Third was a King of many Taxes above all his Predecessors, yet cannot this be imputed as a blot to the honour of the Law, or Liberty of the People; for the King was not so unwise, as either to desire it without evident cause, or to spend it in secret, or upon his own private interests; nor so weak and irresolved, as not to employ himself and his Soldiers to the utmost to bring to pass his pretensions; nor so unhappy, as to fail of the desirable issue of what he took in hand. So as though the People parted with much money, yet the Kingdom gained much honour and renown, and becoming a terror to their Neighbours, enjoyed what they had in fuller security, and so were no losers by the bargain in the conclusion. Secondly, although they parted with much, yet nothing to *Prerogative*, but in a Parliamentary way; and so it was not *taken*, but *given*. Thirdly, though the Taxes were frequent, yet but light: for frequent light Taxes steal insensibly without regret; and as they grow into matters of course, so they meet with acceptance of course. Two things made them of light account. First, they were not Taxes altogether of Money in kind, but of Goods, such as the Sheaf and Fleece, and such-like things, whereof the ownership is visible; whereas many are supposed to have Money which have it not, but must borrow it, or sell their goods at an under rate many times to accomplish it for the payment of their Taxes. Secondly, these Taxes are assessed by the Neighbourhood, and not upon extremity of Survey by Commissioners, who many times are subject to miscarry upon grounds of private Interest, or for want of due information, or by making more haste than good speed.

These Taxes likewise were reduced to the ancient rule, according to the Statute of *Westminster* the first. And thus did this King shew himself truly *Royal in demanding his Taxes upon evident grounds of State, levying them with a tender hand, and employing them to their right end.*

Thirdly, that which digested all, and bred good blood, was, in that the People had *quid pro quo*, by the advance of Trade, wherein the King shewed himself the *Cape-Merchant* of the world. Certainly, mens parts in these times were of vast reach, that could manage such Wars, settle such a Government, and lay such a foundation of a Treasury by Trade; a thing necessary to this Island, next unto its own being, as may appear, not only in regard of the Riches of this Nation, but in regard of the Strength thereof, and in regard of the maintenance of the Crown; the two latter of which being no other than a natural effluence of the former, it will be sufficient to touch the same in order to the thing in hand. Now as touching that, it is evident that the Riches of any Nation are supported by the Conjunction of three regards.

First, *That the natural Commodities of the Nation may be improved.*

Secondly, *That the poorer sort of People be set a-work.*

Thirdly, *That the value of money be rightly balanced.*

For as on the one part, though the People be never so laborious, if the natural

Com-

Commodities of the Island be not improved by their labour, the people can never grow much richer, than barely for subsistence during their labour; so neither can the improvement of the natural Commodity enrich the Kingdom, so long as many mouths are fed upon the main stock, and waste the same by idleness and prodigality. Nor though both these should concur, yet cannot the Kingdom be said truly to be rich, unless by Intercourse and Traffick there be an emptying out of the superfluity of such Commodities by way of Barter, or otherwise, for such Foreign Commodities whereof this Nation standeth in most need for supply of all occasions. For God hath so attempered the whole Regiment of the earth, in such manner, that no one Nation under Heaven can well and comfortably subsist in and by itself, but all must give and receive mutual Commodity from each other: otherwise superfluity would make any Commodity (though in itself never so precious) vile; and little conducive to the enriching of the Nation.

Now for the compassing of all these, the wise men of these times first took into their consideration the principal Commodities of this Kingdom; and because they found them impounded in the *Staple*, they set all at liberty to buy and sell the same as they pleased. And thus began a *Free Trade* of Wool throughout the Realm, and matter for employment by every man that would: but this continued not long. The people soon had Commodity enough for work; and Kings liked too well of the restraining of that liberty in order to their own benefit; and soon found out occasions to reconcile the reason of State with their own Interests, and at length settled the *Staple* in certain places in several parts of the Kingdom. But this extended only unto the Commodities of *Wool*, *Leather*, and *Lead*; for as yet the *Manufactures* were not come to maturity.

Secondly, the endeavour was to advance *Manufacture*, and principally such of them as are made of the *Staple* Commodities, amongst all which *Wool* had the pre-cedency, as being the most principal and ancient Commodity of the Kingdom; and the *Manufacture* of Wool of long use, but had received little encouragement before these times, for that it formerly had been the principal flower in the *Flemish* Garden, and nourished from this Nation, by the continual supply of Wool that it received from hence, which was the principal cause of the ancient League between the House of *Burgundy* and this Crown. But *Edward* the Third was now too well acquainted with the *Flemings* affairs, by a joint engagement with them in the Wars of *France*; and therein had gained so good an opinion amongst them, that he might adventure to change a Compliment for a Courtesy. The *Staples* beyond the Sea were now taken away, he now inhibiteth the Importation of foreign Cloaths; and having gained these two steps onward of his way, he represents to the *Flemings* their unsettled condition by these bordering Wars with *France*, the peaceable condition of *England*, and Freedom of the people; then propounds to them an invitation to come over into *England*, promiseth them share and share-like with his own people, with such other Immunities, as they take his offer, come over, and brought their Manufacture with them, which could never after be recalled. So as now the *Wool* and *Manufacture* dwell together; and, like to Man and Wife, so long as they care for one another, both will thrive; but if they come to play their Games apart, both will be losers in the conclusion.

The third step to the advance of Trade, was the *Exportation* of the Surplusage of the *Staple* Commodities that remained over and besides that

that proportion that should suffice for the Manufactures; to which end it was ordered, that no Wool should be *exported* till it had remained at the Staple by the space of Fifteen days. That time was necessary, and longer time might have been convenient, but that the Markets beyond the Sea could not be delayed longer time, without much damage to the Merchant and Owner: for as much as Winter-time is no time to prepare Wool for the Manufacture; and by over-long continuance of the Commodity upon the hand of the Merchant or Owner, both the Commodity and the Manufacture might surfeit, lie in despair, and Trade choaked thereby. For it is a necessary preparative to Trade, to keep the Nation in some kind of hunger after the Staple-Commodities, so as the main Stock be not too great to occupy, and yet to leave enough to use. But because this Nation formerly had been, and as yet were, used too much to *foreign Manufactures*, the importing of which did debase the home-made Manufactures, and discouraged that work; therefore the Law was made to reduce the vanity of Apparel (which infected these times) to more Sobriety.

Some delight in foreign Commodities and Manufactures, is, doubtless, profitable both for Trade and Shipping; so as what is imported exceeds not what is exported. For too much of that, makes the Domestick Commodity contemptible, the Nation poor, and the People want work; because it is a noted vanity of this Nation, That they love things *far fetcht, and dear bought*. As a cure therefore to this disease, *English Cloth* by Law is enjoined to be worn by all persons under the degree of a Lord; and so the former Inhibition of Importation of foreign Cloaths was strengthened thereby. And because the *English Clothiers* should not take advantage hereby to raise the price of their Cloaths to their own covetous pin; therefore the Law also settled a certain Price and Measure, and the same before sale was to be allowed upon view: and for the goodness of the Cloaths, and perfect working thereof, Laws were likewise made against Exportation of all such as were not perfectly made.

A fourth step to the advancement of Trade, was the compelling men to work; for when publick employment calls men forth for service in the Field, their minds once in commotion, or upon the Wing, can hardly settle any where, or stoop to Perk again, unless upon hope of prey or gain to be gotten thereby. Such were the times of *Edward* the Third, wherein partly for that cause, and partly for the scarcity of men left for the Sword and Pestilence, not only Workmen were scarce and dear, but even the *Mafs* itself was grown stately, the private delights of Kings and Great Men, and scarce vouchsafing to be seen by common gaze, but at a great distance. The Priests had little Charity, and the Poor had as little Money; so as *no Penny no Pater Noster*. A sick and very crazy time questionless was it, when the Clergy were stately, and the Poor idle. The Priests Wages for this cause are now settled; and they that would get much, must get many littles, and do much. But the greater sore was amongst the poorer sort; either they would not serve, or at such wages as could not consist with the price of the Cloaths, and the subsistence of the Clothier. Laws therefore are made to compel them to work, and to settle their Wages; so as now it is as beneficial to them to serve the meaner sort of Clothiers as the richer sort: for the Master must give no more, nor the Servant take more; and thus became labour current in all places.

A fifth means to advance Trade, was the settling of a Rule upon *Exportation* and *Importation*; this wrought a double effect, *viz.* The enriching of this King-

dom with foreign Commodities, and the maintaining of Shipping; which was and is a principal means, not only of strength unto all Sea-bordering Countries, especially regard being had to these three Considerations:

First, *That Importation does bring in more profit than Exportation disburseth.*

Secondly, *That both Exportation and Importation be made by Shipping belonging to this Nation, so far as may consist with the benefit of this Nation.*

Thirdly, *That Exportation be regulated to the Overplus, saving the main Stock at home.*

27 E. 3.

The truth of the *first* will be evident from this ground; That no Nation can be rich, that receiveth more dead Commodities from abroad than it can spend at home, or vend into foreign parts, especially if it be vended in its proper kind, and not in Money. And therefore the Laws provided, that no Merchant should Export more Money than he Importeth; and what he doth Export must be of the new stamp, which it seemeth was inferiour in value to the old: yet the times may prove so penurious, that this rule may be waved for a season.

The *second* is no less beneficial; for as it is in War, so in all Trades; the greater the number is that is employed, the more effectual the issue will be: And therefore though it in the general be more beneficial, that all Exportation and Importation might be by our own Shipping; yet in regard times may be such as now they were, that the Shipping of this Nation is more than ordinarily employed for the service of the State: And that every Nation striveth to have the benefit of Exportation by Vessels of their own.

27 E. 3.

43 E. 3. c. 1.

5 R. ch. 2. c.

3.

6 Rich. 2. c. 8.

14 Rich. 2.

c. 5.

And Lastly, in regard the case may be such, as Importation may be at a cheaper rate by foreign Vessels, and Exportation likewise may for the time be more prejudicial to this Nation, if done by our own Shipping, than those of other Nations: Therefore the course must be changed, so far forth as will stand with the occasions of the State, and common profit of this Nation. And for these causes, and such-like, in the times whereof we now treat, the Laws often varied. Sometimes no Staple-Commodity must be Exported in *English* bottoms; sometimes all must be done by them; and within a year again that liberty was restrained; and after that, liberty given to Foreigners to Export as formerly.

31 E. 3. c. 8.

The *third* and last Consideration is as necessary as any of the former: for if Trade be maintained out of the main Stock, the Kingdom in time must needs be brought to penury, because it is their Magazine. And for this cause it was provided, That all Wool should remain at the Staple 15 days, to the end it might be for the Kingdom's use: if any one would buy they must do it within that time, otherwise it might be exported.

The sixth means of advancement of Trade, was the settling of the *Staple*; for as it was an encouragement to the first establishing of the Manufacture, that the *Staples* were let loose; so when the Manufactures had taken root, the *Staple* especially now fixed to places within this Kingdom, brought much more encouragement thereto.

First, For preserving a full Market. For whilst the Commodity lies scattered in all places, the Market must needs be the leaner; partly in regard the Commodity lies in obscurity, and partly because when it is known where, yet it is not easily discovered whether it be vendible or not; and besides, small parcels are not for every man's labour, and the greater are not for every man's money.

Secondly, *Staples* are convenient for the stating of the general price of the Commodities, in regard the quantity of the Commodity is thereby the more easily discovered, which commonly makes the price. And the quantity of the Commodity thus discovered will not only settle the price to itself, but also ballance the price of the Manufacture.

Thirdly, The *Staple* having thus discovered the quantity of the Commodity, will be a ready way to settle the quantity of the main Stock that must be preserved, and regulate Exportation as touching the overplus. But it cannot be denied that the first and principal mover of the making of the *Staple*, was the benefit of the Crown: For when the Commodity was gone beyond the Sea, it importeth not to the Subjects in *England*, whether the same be sold at one place, or more, or in what place the same be settled, until the Manufacture was grown to some stature; and then the place became litigious. The benefit of Exportation, pretended much interest in the settling thereof beyond the Sea; but in truth it was another matter of State. For when it was beyond Sea, it was a moveable Engine to convey the King's pleasure or displeasure, as the King pleased; for it was a great benefit to the Country or place where-ever it settled; or else it moved or stayed according to the inclination of the People where it was, either for War or Peace. But on the contrary, the Interest of the people began to interpose strongly. And for these causes the Parliament likewise intermeddled in the place; and thus the Scene is altered; Sometimes it is beyond the Seas, in one place or in another: sometimes in *England*.

In *Edward* the Third's time, we find it sometimes at *Calois*, sometimes in *England*.^{43 E. 3. c. 1.}
In *Richard* the Second's time, we find it again beyond the Seas at *Middleburgh*;^{12 Rich. 2. c. 16.}
thence removed to *Calais*; and after into *England*. Where at length the people understood themselves so well, that the Parliament settled the same; it being found too burthensome for the Manufactures to travel to the *Staple* beyond the Seas, for the Commodity that grew at their own doors; besides the enhancing of the price, by reason of the Carriage, which falling also upon the Manufactures, must needs tend to the damage of the whole Kingdom.^{14 R. 2. c. 11.}

This was one way indeed, and yet possibly another might have been found. For if a Computation had been made of the main Stock, and a *Staple* settled within the Kingdom for that, and the overplus exported to a *Staple* beyond the Sea, it might have proved no less commodious, and more complying. It is very true, that there are many that call for the Liberty of the people, that every man may sell his own Commodity as he pleases; and it were well that men would consider themselves as well in their Relations, as in their own Personal Respects. For if every man were independent, his liberty would be in like manner independent; but so long as any man is a Member of a Commonwealth, his liberty must likewise depend upon the good of the Commonwealth; and if it be not good for the Nation that every man should sell his own Commodity as he pleaseth, he may claim the liberty as a Freeman, but not as an *English*-man. Nor is that liberty just, so long as his Country hath an interest in his Commodity for its safety and welfare, as in his own person. I do not assert the manner of buying the *Staple*-Commodities by Merchants of the *Staple*, to sell the same again in kind for their private advantage. Divers limitations must concur, to save it from an unlawful ingrossing; nor doth it appear to me that the *Staplers* in these times used such a course, or were other than mere Officers for the regulating of the *Staple*, in nature of a Court of *Piepowders* belong-

belonging to some Fair or Market. Nevertheless, I conjecture that it may well be made evident from principles of State, that *Marts, Markets, and Staples* of Commodities, that are of the proper Off-spring of this Nation, are as necessary to Trade, as Conduits are to places that want Water.

27 E. 3. stat.
9. cap. 13.
6 E. 3. c. 2.
& 3.

The seventh and last means that was set on foot in these times for the advance of Trade, was the *regulating of the Mint*, and the current of Money. This is the life and soul of Trade: for though exchange of Commodities may do much, yet it cannot be for all, because it is not the lot of all to have exchangeable Commodities, nor to work for Apparel and Victual. Now in the managing of this trick of Money, *two* things are principally to be looked unto: *First*, That the Money be good and current. *Secondly*, That it should be plentiful. As touching the *excellency* of the Money, several Rules were made, as against *embasing of Money*, against *foreign Money* not made current, against *counterfeit and false Money*. For according to the goodness of the Money, so will the Trade be more or less: For the Merchant will rather lose in the price of his Commodity in Money, than in exchange for other Commodity; because the value thereof is less certain, and the Transportation more chargeable.

6 E. 3. c. 2, 3.
17 R. 2. c. 1.

27 E. 3.

Secondly, as touching the *plenty* of Money, that is as necessary to the advance of the Trade, as the goodness of it. For according to the plenty thereof will be the plenty of the Manufactures, because Handicrafts-men having no Commodities but their labour, cannot work for exchange, nor can exchange supply Rents and maintenance to the greater sort of people. To this end therefore it is provided against melting of Money, and Exportation of Silver and Gold. And yet, to encourage or not discourage Importation of Silver and Gold, liberty was given to every man to Export so much as they did Import, provided that what they carry away must be of the new stamp, or minted in this Nation. By this means *Bullion* came in with probability that much thereof would remain in the Nation in lieu of Commodities exported; or if not the greater part, yet at least the *Mint* gained, and that was some benefit to the Nation.

18 E. 3. c. 6.

18 E. 3. c. 6.
25 E. 3. stat.
9. c. 12.

Thirdly, for the fuller currence of the Money, the Issue was established in several parts of this Kingdom, according to the ancient custom; and this was advantageous both to the *Mint*, and to the *Stock* of Money in the Kingdom. This establishment was with this difference, that though the *Mint* was settled by the Parliament, yet the Exchange was left to the Directory of the King and his Council. Because the Exchange is an uncertain thing, subject to sudden alteration in other Nations, and it is necessary that in this Country it be as suddenly ballanced with the Exchange in other Countries, or in a short time the Nation may receive extreme damage. In regard whereof, and many other sudden exigencies in Trade, it seemeth to me convenient, that a particular Council were established for continual influence into all parts of these Dominions, to take into consideration the *quantity of the Staple-Commodities* necessary to be retained as a Stock at home, for the use of the People, and the Manufactures; and accordingly to ballance the Trade of Exportation and Importation, by opening and enlarging, or shutting and straining the Stream, as occasion doth require.

And lastly, to watch the *Course of the Exchange in foreign parts*, and to parallel the course thereof in this Land thereto. For otherwise the publick must necessarily

cessarily suffer, so long as private men seek their own particular interests only in their course of Trade.

C H A P. VIII.

Of Legiance, and Treason, with some Considerations upon Calvin's Case.

AS Times change Manners, so do Manners change Laws. For it is the wisdom of a State, when it cannot over-rule Occasion, to pursue and turn it to the best issue it can. *Multitude of Laws therefore are not so much a sore to the people, as a symptom of a sore people.* Yet many times Laws are said to be many, whenas they are but one, branched into many particulars, for the clearing of the people's understanding, (who usually are not excellent in distinguishing) and so become as new Plaisters made of an old Salve, for Sores that never brake out before. Such sore times were these whereof we now treat, wherein every touch made a Wound, and every Wound went to the Heart, and made the Category of *Treason* swell to that bigness, that it became an *individuum vagum*, beyond all rule, but the present sense of timorous Judges, and a touchy King. Thus were many of the ignorant and well-meaning people in an hideous danger of the gulf of forfeiture, before they found themselves nigh the brim.

All men do agree that *Treason is a wound of Majesty*; but all the doubt is, where this *Majesty* resteth originally, and what is that *Legiance* which is due thereto, the breach whereof amounteth to so high a censure: for some men place all *Majesty* in one man, whom they call an *absolute Monarch*: Others, in the *Great men*: And others, in the *People*; and some in the concurrence of the *King and Body of the People*. And it is a wild way to determine all in one Conclusion, whenas the same dependeth wholly upon the constitution of the Body. Look then upon *England* in the last posture, as the rigider sort of Monarchical Politicians do, and *Majesty* will never be in glory, but in the concurrence of the *King and Parliament*, or Convention of Estates; and so upon the whole account, it will be upon the *People, whose welfare is the supreme Law*. Rome had *Kings, Consuls, Dictators, Decemviri, and Tribunes*, long before the Orator's time; and he saw the foundation of an Empire, or perpetual Dictatorship, in the person of the first of the *Cæsars*: any of all which might have challenged the supremacy of *Majesty* above the *People*. And yet the often change of Government shewed plainly that it rested upon another pin; and the Orator in express words no less; when speaking of the *Majesty* of that Government, he allotteth it not to those in chief command, but defineth it to be *magnitudo populi Romani*. Afterwards, when the pride of the Emperors was come to its full pitch in the times of *Augustus* and *Tiberius*, an Historian of those times, in the Life of *Tiberius*, tells us, That he declared the bounds of *Treason* to be determined in Three particular instances; of *Treachery against the Army*; *Sedition amongst the People*; and *violating the Majesty of the People of Rome*: In all which, men were not punishable for words, but for actions and endeavours. I do not herein propound the Government of the *Roman Empire* as a model for *England*,

Cic. partit.
Orat.

Si quis majestatem populi Romani minuisse. Tacit. An. 1.

England, but a *majori* may conclude, that if the proper seat of *Majesty* was in the people of *Rome* when Emperors were in their fullest glory, it is no defacing of *Majesty* in *England* to seat it upon the *whole body*, from whom the same is contracted in the *Representative*, and so much thereof divided unto the person of the *King*, as any one Member is capable of, according to the work allotted unto him. These several seats of *Majesty* making also so many degrees, do also imply as many degrees of wounding: for it is written in Nature, *That the offence tending to the immediate destruction of the whole body, is greater than that which destroyeth any one Member only*; and when the written Law maketh it *Treason* to compass the destruction of the *King's person*, it leaveth it obvious to common sense, that it is a higher degree of *Treason* to compass the destruction of the *Representative*; and above all, to destroy the *whole body* of the *people*: Crimes that never entred into the conceit of wickedness itself in those more innocent times; much less saw they any cause to mention the penalty by any written Law. Nevertheless, because many sad examples had occurred within the memory of this present Age, of the danger of the *person* and *honour* of *Kings*; and yet on the other side they saw that in such cases of *Treason* the *King's honour* was made of reaching Leather, and might easily be strained within the compass of a wound of *Majesty*: therefore *Edward the Third*, imitating *Tiberius*, reduced the crime of wound of *Majesty* in the Person of the *King*, into certain particular instances, out of the compass whereof the Judges of the Law in ordinary course must not determine *Treason*. These concern either the safety of the *Person* of the *King*, or of the *Succession* in the Royal Throne: Or lastly, the safeguard of the publick Right by the Broad and *Privy-seal*, the value of *Money*, and by persons in matters of *Judicature* judicially presiding; all of them reflecting upon the *King*, considered in his *politick capacity*. For otherwise many crimes might have been mentioned, more fatally reflecting upon the *King* in his *natural capacity*, which nevertheless are omitted, as not worthy of so high a censure. Other *Treasons* are left to the determination of the Parliament as occasion should offer itself, whereof divers examples of a new stamp occurred within forty years next ensuing, which were of a temporary regard, and lived and died with the times.

25 E. 3. stat.
5. c. 2.

17 R. 2. n. 20,
21.
3 R. 2. n. 18.
22 Aff. pl. 29.
Stat. 11 R. 2.

To these two notions of *Majesty* and *Treason*, I must add a third, called *Legiance*, for it is that which maketh *Majesty* to be such indeed, and lifteth it into the Throne, and whereof the highest breach makes *Treason*. And because that which hath been already said reflecteth upon an Opinion, or rather a knot of Opinions (for I find them not punctually adjudged) in *Calvin's Case*, I must a little demur to them, because as their sense is commonly taken, it alters the fundamental nature of the Government of this Nation from a *Commonwealth* to a *pure Monarchy*. In handling of this Case, the honourable Reporter took leave to range into a general Discourse of *Legiance*, although not directly within the conclusion of the Case; and therein first sets down the general nature thereof, That it is a *mutual bond between an English King and his people*; and then more particularly sets forth the nature of this bond in the several duties of obedience and fealty, fol. 5. a. and those also in their several properties, viz. *Natural*, *Absolute*, fo. 7. a. due to the *King omni, soli, & semper*, fo. 12. a. in his *natural* and not *publick capacity*, fo. 10. a. Whereas he saith, this bond is *natural*, he meaneth that it is *due by birth*, fol. 7.

fol. 7. a. By *absolute* (if I mistake him not) he meaneth that it is *indefinite*, fol. 5. b. viz. *not circumscribed by Law*, but *above Law*, and *before Law*, fol. 13. a. and that *Laws were after made to enforce the same by penalties*, fol. 13. b. and therefore he concludeth that *this Legiance is immutable*, fol. 13. b. and fol. 14. a.

Thus having stated the point as truly as I can, both for the nature of *Legiance*, and the object thereof, viz. the *King*; and not the *People*, otherwise than in order to the safety and honour of the King's person, considered in his *natural capacity* as he is a *man*: I shall in the next place examine the grounds as they are severally set down, and therein shall lead the Reader no further than the Reporter's own concessions. Not troubling the Reader with any doubt, whether this *Bond* consists in *obedience* only, or in that *fealty*: and in all, shall ever be mindful of the honour of that Pen with which I have to deal.

First, whereas it is said, that *English Legiance is natural*, and grounded upon the *birth* of each party within the King's Dominions and Protection, it needeth no debate, so as the same be taken *sano sensu*, viz. for a *qualified Legiance*, without those sublimities of *absolute*, *indefinite*, *immutable*, &c. for otherwise if such a high strain of *Legiance* be due from every *Englishman by birth*; then all the *Magna Charta*, or Laws concerning the *Liberties* of the people, come too late to qualify the same, because they cannot take away the *Law of Nature*, fol. 14. a. And thus the party once *born English*, must for ever remain *absolutely obliged to the King of England*, although haply he lives not two Months under his protection all his ensuing life-time.

Secondly, the *Legiance* of an *English-man* to his King, ariseth from that civil Relation between the two Callings of *King* and *Subject*, and therefore it is not a *natural bond* which cannot be taken away. The first is true, by the Reporter's own concessions; *Proteſtio trahit ſubjectionem, & ſubjectio proteſtionem*; so he saith, fol. 5. a. fol. 9. b. and therefore though it be granted that Magistracy in general is from Nature, as he saith, fol. 13. a. yet of weak birth is that inference which he maketh, viz. That *English Allegiance is a principle in Nature*. Unless it be also admitted, that all men on Earth that submit not to *English Legiance* do sin against Nature. The difference then will stand thus; *Magistracy* is founded in Nature, therefore *Legiance* also. But *English Magistracy* is from *Civil Constitution*, therefore is *English Legiance* of the like nature. In the next place the Reporter saith, that before any *Municipal Law* was made, Kings did *dare jura*; and he mounts as high for an example as the *Trojans Age*, by the Testimony of *Virgil*. But I believe he intended not much strength in this, seeing it is well known by any that knows the Scriptures, that there were *Municipal Laws* given, and that concerning the Office of a King, by *Moses*, which were more ancient than those of *Troy*, and long before the time of *Virgil*, who neither tells us in what manner those *Trojan Laws* were made, though the Kings gave them; nor if all were according to the Reporter's sense, is the testimony of a Poet (who sometimes useth his *Poetica Licentia*) to be taken *in terminis*.

In the next place, the Reporter voucheth the Testimony of *Fortescue*, c. 12, & 13. which is as absolutely opposite to the main point in hand, as any Pen can declare: For he tells us of divers sorts of Kingdoms, some gotten by *Conquest*, as those of *Nimrod* and *Belus*, &c. But, saith he, *There is a Kingdom politick, which is by the association of men by consent of Law, making one chief, who is made for*
refence

Of Legiance and Treason, during the

defence of Law, and of his Subjects Bodies and Estates, and he cannot govern by any other power; and of this nature, saith he, the Kingdom of England is, fol. 30, 31, 32. A second piece of the foundation of this opinion of the Reporter is taken ab inani; it is a vain thing, saith he, to prescribe Laws, but where by Legiance foregoing, people are bound to obey. But this compared with the words of Fortescue, formerly mentioned, falls of itself to dust; and therefore I shall not further enlarge concerning it.

Thirdly, the Reporter brings in, to help the matter, the consent of the Law in elder times, by certain Cases vouched to that purpose; the first concerning the *Legiance of Children to Parents*; which cometh not to this case, because it is a *Legiance of Nature*; and this *Legiance* whereof we speak, is yet under a litigious Title: And I suppose will in the conclusion be found to rest only upon a *Civil Constitution*; therefore I leave that. The second is, *That a man attainted and outlawed, is nevertheless within the King's protection; for this* (saith the Reporter) *is a Law of Nature, indebilis & immutabilis, and neither Parliament nor Statute can take this power away, fol. 13. b. 14. a.* And therefore the Reporter concludes, *That as well the Legiance of the Subject, as the Protection of him by the King, are both of them from the Law of Nature.* An opinion that speaks much mercy, yet it seems strange, considering the Pen: for if it be a Law of Nature, and immutable, for the King to protect persons attainted, then must no such person suffer; for if he be under the King's protection, that being by a Law of Nature, cannot be changed by any positive Law, as the Reporter saith; nor can the King be so bound by any such Statute, but by a *non-obstante* he can set himself at liberty when he pleaseth: and then the issue will be this; The King hath a natural power to protect the persons of Law-breakers from the power of the Law, therefore much more their Estates; and then farewell all Law, but this of the *King's natural Protection*. I say that these are of a high strain, considering what the Reporter speaketh

11 Co. fo. 88. elsewhere. But to pursue his instance, he saith, *That the King hath power to pro-*
 8 Co. fo. 20. *tect an attainted person: That if any man kill him without warrant, he is a man-*
 4 Co. fo. 35. *slayer; and yet this person attainted hath lost the legal protection.* It is true, yet not
 7 Co. fo. 30. to all intents; for by the Sentence of the Law, his life is bound up under the Law
 35 H. 6. 63. of that Sentence, viz. *That he must not suffer in other manner than the Sentence de-*
termineth, nor before Warrant of Execution issue forth to that end. And notwithstanding the Sentence, yet the Law leaveth him a liberty of Purchase, or Inheritance, though to the use of the Crown; and therefore in some respects the Law protects his person so long as he lives, and the *King's natural Protection* is in vain in such cases.

Lastly, suppose the King hath a power of *Non-obstante*, if the same be allowed to him in a limited way by the Law, it is no Argument to prove the *King's natural power*, which is driven at under *natural Legiance*, much less if it cannot be made forth that the Law doth allow any such power of *Non-obstante* at all; but by the iniquity of the times, permitteth the same to subsist, only to avoid Contention, as it came into this Kingdom by way of Usurpation. And thus I have only discovered the Foundation of this first Qualification, which I shall only leave naked, supposing that no man seeing it, will build at all thereupon.

The second Property that cometh to be considered is, *That English Legiance is absolute, fol. 5. b. fol. 7. a.* which is a word of a vast extent, serving rather to amaze men's apprehensions than to enlighten them. And there-

therefore the Reporter did well not to trouble himself or the Reader in the clearing or proof thereof, but left the point rather to be believed than understood; nor shall I in the Negative. For God himself can have no other *Legiance*, from an *Englishman*, than *absolute Legiance*; and *Kings* being (as other men) subject to err, especially in this point of *Prerogative*, are much rather subject thereto, being misled by such Doctrines as these are. The Scripture determines this point, and Acts 14. 19. cuts the knot in sunder.

The third property of *English Legiance* which the Reporter insisteth upon, is, that it is *indefinite*; which he explained to be *Proprium quarto modo*, so as it is both *Universal* and *Immutable*, fol. 5. b. fol. 12. and neither defined by *Time*, *Place*, or *Person*. As touching the *Time* and *Person*, the Reporter enlarged not at all, therefore I shall only leave the Reader to chew upon the point, supposing himself in the first times of *Edward* the Fourth, when *Henry* the Sixth was then alive; and let him resolve to which of them his *Legiance* had been due, considering them both in their *natural capacity*, as the Reporter would have it. But as touching the place, it is reported that *English Legiance* is not only due from an *English Man* to an *English King* in *England*; but in all places of the King's Dominions, tho' otherwise Foreign, as to the power of the Law of *England*. Yea, saith the Reporter, *as far as the King's power of protection doth extend*. And yet this had not been enough, if the Premises be granted: For if this *Legiance* whereof we speak be *absolute*, and *omni, soli, & semper*, then it is due to the King from an *English Man ubi vis Gentium*. Nevertheless, to take the Reporter in a moderate sense, it is worth consideration, whether *English Legiance* in the days of *Edward* the Third extended as far as the King's power of Protection, whenas he had the Crown of *France* in a Foreign right to that of *England*. In this the Reporter is extremely positive, upon many grounds which he insisteth upon.

First, he saith, that *Verus* and *Fidelis* are qualities of the mind, and cannot be circumscribed within the predicament of *Ubi*; and upon this ground he might conclude, that this *Legiance* is due to the King from an *Englishman* all the world over, as well as in the King's Dominions. But concerning the ground, it may be denied: for though simply in it self considered as a notion, *Verity* or *Fidelity* are not circumscribed in place; yet being qualities of the Soul, and that being in the Body, in relation thereunto, it may be in the predicament of *Ubi*: for where-ever that *Body* and *Soul* is, there is *Faith* and *Truth* according to its model; which though not *absolute* and *indefinite*, yet if according to the Laws of the place wherein the Man is, he is truly said to be *Verus & Fidelis*.

Secondly, The Reporter argueth, that the King's Protection is not *local*; or included within the bounds of *England*, therefore also is not the *Legiance*: for, *Proteſtio trahit Legiantiam, & Legiantia Proteſtionem*. Had this reason been formed into a Syllogism, it had appeared less valuable; for the Protection of an *English King, qualis*, of an *English Man*, is *local*, and included within the bounds of the Kingdom. But if the same King be also King of *France*, or Duke of *Aquitane*, and an *Englishman* shall travel into those parts, he is still under the same King's protection, yet not as King of *England*, but as King of *France*, or Duke of *Aquitane*. Otherwise, let the party be of *France*, or *Aquitane*, or *England*, all is one, he must be (whether *French* or *English*) under an *unlimited absolute Protection*, with-

out regard had to the Customs or Laws of the place; yea, contrary to them, which I believe the Reporter never intended to affirm.

Thirdly, The Reporter falleth upon the *matter in fact*, and tells us, that the King of *England* did many times, *De facto*, grant Protections to persons in places out of the *English* Confines; and it will not be denied. But never was any *absolute and indefinite* Protection so granted: for the *Protection* extends to defence from injury, and all injury is to be expounded and judged according to the Laws of the place. Nor do any of the Precedents vouched by the Reporter clear, that the King of *England* did grant as King of *England*, Protection to any *Englishman* in any parts of the King's Dominion beyond the Seas, which was not qualified according to the Laws and Customs of that place. Especially it being apparent, that an *English* King may hold Dominion in Foreign parts, in Legiance under a Foreign King; as *Edward* the Third held the Dutchy of *Guien*; and therefore cannot grant *absolute Protection* in such place, nor receive *absolute Legiance* from any person there being.

Fourthly, The Reporter saith, That the King of *England* hath power to command his Subjects of *England*, to go with him in his Wars, as well without the Realm of *England* as within the same; therefore the *Legiance of an Englishman* to his King, is *indefinite*, and not *local*, or *circumscribed by place*, or *within the Kingdom of England*. Although the first of these be granted, yet will not the inference hold; for possibly this may arise from the constitution of a positive Law, and not from *natural* or *absolute Legiance*; nor doth any Authority by him cited, justify any such *Legiance*. But I cannot agree the first; for it is not true, that the King hath any such power from his own personal interest; nor doth the authority of former Ages warrant any such matter. For a fuller disquisition whereof, I shall refer the Reader to the eleventh Chapter ensuing, because the *whole matter concerning the Militia cometh there to be handled in course*.

Fifthly, To close up all the rest, the Reporter brings the *Testimony of the Judges of the Common Law*, out of the *Testimony of Hengham*; wherein an *Action* was brought by a Frenchman against an *Englishman*, who refused to answer, because the Plaintiff was a Frenchwoman, and not of the *Legiance or Faith of England*. This was disallowed by the Judges, because *Legiance and Faith* was referred to *England*, and not to the King. Thereupon the Defendant averred, that the Plaintiff is not of the *Legiance of England*, nor of the *Faith of the King*: And upon this Plea thus amended, the Plaintiff gave over her *Action*. The Reporter from hence observeth, that *Faith and Legiance* is referred to the King *indefinitely and generally*, and therefore it is so due to him. The reason might have had more force, had the Object of *Allegiance*, or the nature thereof, been the point in question; but neither of them coming to debate, and *Allegiance* being subjected to *England*, and *Faith* to the King, I see not what more can be concluded from hence, but that *Allegiance* from an *Englishman* is due to *England*, and *Faith* to the King; which I suppose must be intended to be in order to that *Allegiance*; because by the former Plea *England* had them both, and the King was wholly left out in the Case. Nevertheless, I rather think that the present point in controversy will receive little light herefrom on either part.

We are now come to the fourth property of *English Legiance*, that it is due to the King's *Natural Capacity*, and not to his *Politick Capacity*, or due to the Office of a King, in regard of the Person of the Man, and not to the Person in regard of the Office, *fol. 20.* And because this is of no small importance, neither easily understood, nor granted: Therefore he backeth his Opinion by many Reasons.

First, he saith, that the King sweareth to his Subjects in his *Natural Capacity*, therefore the Subjects swear to him in his *Natural Capacity*. This reason was intended to be taken from Relatives, and then it should have been thus: *A King doth swear to his Subjects in their Natural Capacity, therefore Subjects swear to a King in his Natural Capacity.* But it being otherwise, it is mistaken, and proves not the Point. Yet if we should take the Reporter in *sano Sensu*, there is no question but the Oath is made to the *Natural Capacity*; yet not *Terminative*, more than the Oath of the Tenant to his Lord, which this Author pleaseth to couple with the mutual dependence between King and Subject, *fol. 4. b. 5. a.* Nor doth the Oath of an *Englishman* bind him to the Obedience of all, or any Commands, which the King shall give in relation only to his *Natural Capacity*, or in opposition to his *Politick Capacity*: Nor will the Reporter himself allow that the *Politick Capacity* of the King, can be separate from his *Natural Capacity*, *fol. 10.* And yet it is evident that a King may in his *Natural Capacity* command that, of which his *Politick Capacity* cannot give Allowance.

The second reason of this Opinion, is taken from the nature of *Treason*, which saith the Reporter is committed against the *Natural Person* of the King; and this is against *due Legiance*, according to the form of Indictments in that case provided. This is not *demonstrative*, because that crime which is done against the *Natural Person* of a Man, may as well extend to it in relation to his Place or Office: and so may *Treason* be plotted against the *Natural Person* of a King, as he is a King; neither is there any other difference between the murder of a King, and a private Man, but only in regard of the *Place* and *Office* of a King, which makes the murder of him *Treason*. For which cause all Indictments that do conclude, *contra Legiantie debitum*, do as well also conclude *contra Coronam & Dignitatem, &c.*

The third reason is this: A *Body Politick* can neither make nor take *Homage*, 33 *H. 8. Bro. tit. Fealty*: Therefore cannot the King in his *Politick Capacity* take *Legiance*. The first must be granted only *sub modo*: for though it cannot take *Homage* immediately, yet by the means of the *Natural Capacity*, it may take such service. And therefore that Rule holds only where the *Body Politick* is not aggregate, and not one Person in several Capacities; for the Tenant that performs his service to his Lord, performs the same to his Lord in his *Natural Capacity*, but it is in relation to his *Politick Capacity*, as he is his Lord. For Lord and Tenant, King and Subject, are but Notions, and neither can give nor take service; but that Man that is Lord, or Tenant, or King, or Subject, may; even as the power of protection is in a King, not as he is a Man, but as a King.

The fourth reason is this: The King's *Natural Person* hath right in the Crown by Inheritance, therefore also in the *Legiance* of the Subject. This is the strength (as nigh as I can collect) of that which is set down as a sixth reason; but I make

Of Legiance and Treason, during

it the fourth: because the third, as I conceive, is but an illustration of the second; and the fifth is upon a supposal of a *Fides Ficta*; whereas that *Faith* of an *English* Subject, which is according to Law, is the truer of the twain. But to the substance of this fourth reason: If the first be granted, yet the Reporter cannot attain his conclusion; for the King may in his *Natural Capacity* have right to the Crown by Inheritance, and yet not right in the *Legiance* of his Subjects, otherwise than in the right of the Crown. As in the case of Lord and Tenant, the Lord may inherit the Lordship in his *Natural Capacity*, but the service is due to him as Lord, and not as by Inheritance in the service in the abstract. And though it be granted, that the *Legiance* to a King is of a higher strain than that of a Tenant to his Lord, fol. 4. b. 5. a yet doth the Reporter bring nothing to light, to prove them to be of a different Nature in this regard.

The fifth and last reason that cometh to consideration, is, from a Testimony of the Parliament: for it is said, *That this damnable Tenet of Legiance to the King in his Politick Capacity, is condemned by two Parliaments*: But in truth I can find but one under that Title, that mentioneth this Opinion, and that is called *Exilium Hugonis*, which in sum is nothing else, but Articles containing an enumeration of the particular offences of the two *Spencers* against the State, and the Sentence thereupon. The offences are, *For compassing to draw the King by Rigour, to govern according to their Wills: for withdrawing him from hearkning to the advice of his Lords: for hindring of Justice, and Oppression; and (as a means hereunto) they caused a Bill or Schedule to be published, containing, That Homage and Legiance is due to the King, rather in relation to the Crown, than absolutely to his Person; because no Legiance is due to him, before the Crown be vested upon him: That if the King do not govern according to Law, the Lieges in such case are bound by their Oath to the Crown, to remove him either by Law or Rigour.*

This is the substance of the Charge; and upon this exhibited in the House, the Lords, *super totam materiam*, banish them before their Case is heard, or themselves had made any appearance thereunto. So as to the matter of this Schedule (which contains an Opinion suitable to the point in hand, with some additional aggravations) the Parliament determineth nothing at all: but as to the publishing of the same, to the intent to gather a party, whereby they did get power to act other enormities mentioned in the Charge. And in relation to those enormities, the Lords proceeded to sentence of Banishment; all which was done in the presence of the King, and by his *disconsent*, as may appear by his *discontent* thereat, as all Historians of those Affairs witness. And it is not probable that the King would have been discontented with the proceedings of the Lords in asserting the Prerogative of a King, in that manner of the Schedule, if he had perceived any such thing in their purposes. Add hereunto, that the Lords themselves justified the matter of the Schedule in their own proceedings, all which tended to enforce the King to govern according to their Counsels, and otherwise than suited with his good pleasure. By force they removed *Gaveston* from the King's presence formerly, and afterward the *Spencers*, in the same manner: So they removed the King from his Throne, and not long after out of the World.

Last of all, I shall make use of one or two Concessions, which have passed the Reporter's own Pen (in this discourse of his) for the maintaining, that the *Legiance* of an *Englishman*, is neither *Natural*, nor *Absolute*, nor *Indefinite*, nor due to the *Natural Capacity*, but qualified according unto Rules.

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The first is this; *Englishmen do owe to their Kings, Legiance according to their Laws*; therefore it is not *Natural*, or *Absolute*, or *Indefinite*. The inference is necessary: for the latter is boundless and natural; the former is limited, and by civil Constitution. If any breach therefore of *English Legiance* be bounded by Law, then the Legiance of an *English* man is circumscribed, and not Absolute or Natural. The major proposition is granted by the Reporter, who saith, that the Municipal Laws of the Kingdom have prescribed the order and form of *Legal Legiance*, fol. 5. b. And therefore if by the Common Law, the Service of the King's Tenant, as of his Mannor, be limited, how can that consist with the absolute Legiance formerly spoken of, which bindeth the Tenant, being the King's Subject, to an Absolute and indefinite Service? Or if the Statute-Laws have settled a Rule, according to which each Subject ought to go to War in the King's service beyond the Sea, as the Reporter granteth, fol. 7, & 8. then cannot the Legiance be absolute to bind the Subject to go to War according to the King's own pleasure.

Secondly, An *English* King's protection of his Subjects, is not natural, absolute, indefinite, nor originally extendeth unto them in their Natural Capacity: therefore is not the Legiance of an *English* Subject to his King, natural, absolute, indefinite, nor originally extendeth to the King, in his natural Capacity.

The dependence of these two resteth upon the Reporter's own words, who tells us, that *Proteſtio trahit Subjectionem, & Subjectionem Proteſtionem*; Protection draws with it Subjection, and Subjection draws with it Protection, so as they are *Relata*, and do prove mutually one another's Nature, fol. 5. a. And in the same Page (a few Lines preceding) he shews why this *Bond* between King and Subject is called *Legiance*, because there is a reciprocal, and double *Bond*: for as the *Subject* is bound in *Obedience* to the *King*, so is the *King* bound to the *Subject* in *Protection*: But the King is not naturally bound to protect the people, because this *Bond* begins not at his Birth, but when the Crown settles upon him.

Thirdly, This Protection is not absolute, because the King must maintain the Laws, fol. 5. a. and the Laws do not protect absolutely, any man that is a breaker of the Laws.

Fourthly, This protection is not indefinite, because it can extend no further than his power, and his power no further than his Dominions, fol. 9. b. The like also may be instanced in continuance of time.

Lastly, the King's protection extendeth not originally to the Natural Capacity, but to the Politic Capacity; therefore till a Foreigner cometh within the Kings Legiance he cometh not within his Protection: and the usual words of a Writ of Protection shew, that the party protected must be *in Obsequio nostro*, fol. 8. a. The sum then is, that as *Protection of an English King*, so neither is *Legiance*, or *Subjection of an Englishman*, natural, absolute, indefinite, or terminated in the natural Capacity of the King. And to make a full period to the point, and to make the same more clear, I shall instance in one Precedent that these times of *Edward* the Third produced. The former *English* Kings had Title to many Territories in *France*, but *Edward* the Third had Title to all the Kingdom. And being possibly not so sensible of what he had in possession, as of what he had not; he enters *France* in such a way, and with that success, that in a little time he gains the highest seat therein, and so

14 E. 3. Stat.
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so brought much honour to the *English* Nation; and more than stood with the safety of the Kingdom. For in the union of two Kingdoms, it is dangerous for the smaller, lest it be swallowed by the greater. This was foreseen by the *English*, who knew *England* did bear but a small proportion to *France*, and complained of that inconvenience; and thereupon a Law was made, that the people of *England* should not be subject to the King or his Heirs, as Kings of *France*. Which manifestly importeth, that an *English* King may put himself in such a posture, in which *Legiance* is not due to him; and that this posture is not only in Case of Opposition, but of Diversity, when he is King of another Nation, and doth not *de facto*, for that Time and Place, rule as an *English* King. Which if so, I suppose this notion of *Natural, Absolute, and Indefinite Legiance* to the King in his *Natural Capacity* is out of this Kingdom, if not out of the World: and then the foot of the whole Account will be, that the *Legiance of an Englishman*, is originally according to the *Laws*; the sum of all, being comprehended in the joint safety of the people of *England*.

C H A P. IX.

Of Courts for Causes criminal, with their Laws.

2 E. 3. c. 2.
& 7.

THE great growth of Courts founded upon Prerogative, derogated much in these times from the Ancient Courts, that formerly had attained the Sovereignty over the people, and their Laws in the hearts of them all. This was a hard lesson for them to learn, but especially of the *King's Bench*, that was wont to learn of none; and yet must be content to part with many of their Plumes to deck the *Chancellor*, much of their work to busy the *Prerogative Courts* holden *coram Rege*, and more to those holden *coram Populo*; I mean, *The Courts of Oyer and Terminer, Goal-delivery, and Justices of Peace*. Those of *Oyer and Terminer* were now grown very common, but less esteemed, as being by men of mean regard nominated for the most part by the party that sued out the Commission, which for the most part was done in behalf of those that were in danger, and meant not to be justified by Works but by Grace. These escapes, though small in the particulars, yet in the full sum made the matter so foul, as it became a common Grievance; and a rule was thereupon set by the Parliament, for the regulating both of the Judges of such Courts, and the Causes. The Commissions for *Goal-delivery* likewise, grew more mean and ordinary: The chief sort of Men in the several Counties had formerly the power, but were found to favour too much of Neighbourhood and Alliance. The leading of the work therefore, is now committed to the Judges at *Westminster*, and the other made only Associates to them. But above all, the Courts of *Sheriffs, Coroners, and Leets*, were now grown sour with Age, having attained courses by common practice, differing from Oppression only in Name; and yet were the times so unhappy, as by these courses they had obtained favour and respect amongst the great men, and so gained more power from above, to abuse those below. These men loved to be Commissioners of *Oyer and Terminer*, and having learned how to make capital offences pecuniary, found such sweetness, as they used not to be weary of their places, though the Country grew weary of them; and therefore disliking uncertainties, in such matters of benefit, they cannot rest till they obtain more certain

certain settlement in their places; some for Years, others for Life and some for ever.

The Disease thus contracted by degrees, the Cure must be accordingly: First, the *Sheriffwicks*, much dismembred to please the Court-favourites, and fill the King's privy Purse, and all raised to the utmost penny of the full, and beyond the just value: A Law is therefore made to restore the several *Hundreds*, and *Wapentakes*, to the Sheriffs and their Counties and all of them are reduced to the old^{4 E. 3. c. 12. & 15.} Rent: And it is likewise provided, that none shall execute that place in any County or Hundred, who shall not then have sufficient Lands in that County to answer damages for injustice by them done. And that no *Sheriff* shall serve in that place above one year; and then not to be chosen again for that service till three years^{2 E. 3. c. 4. 4 E. 3. c. 4. 1 Rich. 2. c.} be past: which latter clause was only by a *medium* taken up for the present occasion, in regard that men of ability became very rare in those times, especially^{11.} in some of the Counties.

The *Election* of the *Sheriff* is likewise not to be forgotten; for though the Counties had the election of Coroners in regard they looked that no man should come nigh their blood but whom they trusted; yet the Sheriff came not now so^{28 E. 3. c. 6.} nigh their skin, nor yet so nigh their Freeholds as anciently they had done, for that their power in Judicature was much abated, and so not worthy of so high regard; yet in respect he was still to be a Minister of Justice, and his place valuable more than formerly, it was holden convenient that such as had the chief power of Ju-^{14 E. 3. c. 7.} dicature at *Westminster*, viz. the *Chancellor*, *Treasurer*, *Chief Baron*, and the two *Chief Justices*, should nominate the man that should be their Servant; and yet in the^{14 E. 3. n.} Parliament nevertheless they interposed in that Election as often as they saw cause.^{33.}

Secondly, as touching *Causes criminal*, which more ordinarily come within the cognizance of these Courts. They generally held the same regard in the eye of the Law in these times, that they had done formerly; nevertheless, in two crimes these times wrought diversly, urging the edge of the Law against the one, and abating it as to the other. The latter of these is commonly called *Petit Treason*, which is a murder [*Treason*] destructive to the Commonwealth, in an inferior degree, and at a further distance, because it is destructive to that *Legiance* by which Families do consist, and of whom Kingdoms are derived.

In former times it extended unto the *Legiance* between Lord and Tenant, and^{Mirror Just. c. 2. sect. 13.} Parents and Children: But by this Law of 25 E. 3. it is reduced to the *Legiance* only of Man and Wife, Master and Servant, Clerk and his *Ordinary*: the last of^{21 E. 3. fol. 17. b.} which was now lately taken up, and might have been as well laid aside, as divers others were, but that in these times much is to be yielded to the power of the Prelacy, who loved to raise the power of the *Ordinary* to an extraordinary pitch, that themselves might be the more considerable.

This reducing of *Treason* into a narrower ground, made the Regiment of Felonies to swell. A hard thing it was in a Warring time, for men to conceit themselves well drest, until they were compleatly armed. Some used it for a Complement, and amongst others, honest men had as good cause to use it, as some that were ill-affected had a bad; and of the last sort, some did aim at private revenge, though many aimed against the publick quiet. But however the intentions of men thus harnessed might be different, the looks of them all are so sour, that it is hard to know a man for Peace, from a man for War. And therefore the people

ple were now so greedy after Peace, as they are ready to magnify or multiply all postures of arm'd men into the worst fashion, being well assur'd that the readiest way to keep themselves from the hurt of such men, is to have none of them at all. But *Edward* the Third had more need of them than so, and will therefore allow
 25 E. 3 c. 2. men to ride armed, but not to troop together, to rob, kill, or imprison any man; and if any person did otherwise, it should be Felony, or Trespass, but not High Treason.

All this was in favour to the people, and yet this was not all; for when Mercy groweth profuse, it becomes Cruelty. *Murder* is very incident to times of War, yet is an Enemy to the Peace, of so high a nature, that though the King's Pardon may do much, yet both King and People declare it an unpardonable crime, by the Common Law, and that the King's Prerogative shall not extend so far as to pardon the same. This Justice done to the party dead, was a mercy to them that were alive; a means to save blood by bloodshed; and not so much by the King's Grant, as by his Release. One thing more in these cases of blood the people obtained of the King, which they had not so much by Release as by Grant, and that was the taking away of *Englshire*, an ancient Badge of the Imperial Power of the *Danes* over the *Saxons*; and which had either continued through the desidioufness of the *Saxons* in the times of *Edward* the Confessor, unto the *Normans* time, or by them taken up again, and continued until these times, that *Edward* the Third was so far desirous to declare his readiness to maintain the Liberties of the people, as to be willing to restore them when they failed, and in particular took away the manner of presentment of *Englshire*, blotting out the Title and Clause concerning it, out of the Articles of Inquiry for the Judges *Itinerant*. And thus,
 14 E. 3 c. 4. whether Native or Foreigner, all men are now made in death equal, and one Law serves all alike.

Next unto blood, these times grew more sensible of *Ravishments* than former times had done. For though they had determined a severe penalty against so foul a crime, and made it in the nature of a Felony capital, which was enough to have scared any man from such attempts; yet for that the proof of the matter in Fact, much rested upon the will of the Woman, which for the most part, grounded upon self-respects, and private prudence, laboured to conceal that which could not be made whole by revealing; and by after-consent, skin'd over the sore as to themselves, which corrupted inwardly, and endangered the whole Body. To
 6 Rich. 2. c. 6. cure which, a Law is made to restrain such late connivance in the Woman, by de-
 5 E. 4. fol. 58. priving her both of her Jointure and Inheritance, which otherwise had been saved to her by such compliance, as after-consent unto such violations.

C H A P. X.

Of the Course of Civil Justice during these times.

HOWEVER the course of the Law concerning matters of the Crown, passed in a troubled Wave; yet in matters of Common Pleas, it passed in a calm and full Channel, as the Reports in Print do sufficiently witness; nor was there any change of Principles, but only some alteration

teration tending to a clearer manifestation of the same. I will not touch upon every particular, but only upon two, which reflect somewhat upon the publick Policy; the one touching the course of *Inheritance* in some particular cases, the other touching *pleading* in the Courts of Civil Justice.

The first of these was occasioned from a Conjunction of Affairs, the case being such, that *Edward* the Third had now gotten himself a new Kingdom unto that of *England*, and must look to maintain that by power, which he obtained by force; and conducing thereunto, must have continual employment of the *English* in that Service, as being most trusty to his Cause. And that it is unreasonable, that such *English* as had devoted themselves to his Service in his Cause, and in order thereunto, had transported themselves and their Families into those foreign parts, should thereby lose the benefit of *Lieges* in the Birth-right of their Children born ^{17 E. 3. n. 19.} in those foreign parts. Upon consideration had thereof, and of a former leading Opinion of the Lawyers and Parliament, a Declarative Law was made, *That all Children born without the King's Legiance, whose Father and Mother, at the time of their birth, shall be under the Faith and Legiance of the King of England, shall* ^{25 E. 3. Stat.} *have the benefit of Inheritance within the same Legiance, as other Inheritors have.*^{2.} These are the words of the Statute, and do occasion a double observation; one from the matter, the other from the manner of the Expression.

The subject *matter* is so delivered, not as an Introduction of a new Law, but as a Declarative of the old, that lay more obscurely hidden, for want of occasion to reveal it; and the substance thereof resteth only in this: To enable the Children of *English* Natives, born beyond the Seas; not the Children of those that are of foreign birth, though within the King's Territories in those parts, as the Opinion hath been *. Nor doth any ancient Precedent or Case warrant the same; ^{* i. e. in Cal-} as might be at large manifested, if it might conduce to the end of this Discourse. ^{ain's Case, 8} And for the same cause, after this Statute, whenas the Commons would have had a general Naturalizing of all Infants born beyond the Sea, within the King's Seniorities; the same would not be granted, otherwise than according to the former Statute, and the Common Law. ^{Covide ant.}

42 E. 3. c. 10.

That which in the next place concerneth the manner of Expression, is this: *That a Child is said to be born out of the King's Legiance, and yet the Father and Mother at the same time to be of the Faith and Legiance of the King of England.* It seemeth to me, that it intendeth only those Children of *English* Parents, born within the King's Territories beyond the Seas, because the words ensuing, concerning Certification of *Bastardy* of such Children, are, *That the same shall be made by the Bishop of such place, upon the King's Writ directed to him;* which could never have passed into those places that are not of the King's Territories: And so the Issue will be, That the *Legiance* of those born in those parts, though they are *Lieges* to the King, yet they are not of the *Legiance* of the King of *England*, but as Lord of that Territory.

The other matter to be observed concerning pleading in the Courts of Civil Justice, is this: That whereas anciently, from the *Normans* time, till these times, the pleadings were in the *Norman* Tongue, 'tis now enacted, they shall be hence- ^{36 E. 3. c. 15.} forth in *English*; out of an inconvenience, I believe, rather supposed than felt.

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For though some kind of knowledge of *Law-Terms* may be increased thereby, yet unless that shall be professedly studied, it will breed nothing but Notions, and they an over-weening conceit, which many times sets men to Suits in Law to their own loss *; like some weak influence of the Celestial Bodies, that are strong enough to stir up humours, but not to expel them, or draw them out. However, even thus in part is the reproach of *Normandy* rolled away, like that of *Egypt* from the *Israelites* at Mount *Gilgal*.

* See Preface to *Boswell's English Lawyer*.

C H A P. XI.

Of the Militia in these times.

WAR is ever terrible, but if just and well governed, majestic; the one may excite resistance and defence, but the other conquers before blow given; because it convinceth the Judgment, and so prevails upon the Conscience. For that heart can never be resolute in its own defence, that is at war with its own understanding; nor can a Heart, confident of the Justice of its cause, consider such a War otherwise than as *Divine*, and bearing the face of an Ordinance of God; and then how can the Issue be unsuccessful? It is no strange thing for Kings to miscarry in their Wars, because it is rarely seen that they are under good Counsel; but if a *Christian* Counsel miscarry, we may conclude it extraordinary in the efficient cause, and no less wonderful in the issue and end. Upon this ground it concerneth a *Christian* Nation, not only in point of honour, but of safety and continuance, to settle fundamental Laws for War, against time of War; as of Peace in time of Peace. Neither was *England* deficient herein, saving that antient times were more obscure in the particulars, and these days revealed them at such a time, wherein we may say, that *Edward* the Third approved himself not only King of *England*, but of himself, above the ordinary strain of expectation. For being now become a famous Commander and Conqueror, having also an Army inured to fight and overcome, and so might have given a Law; he nevertheless received the same, submitting both it and himself to the Directory of the Parliament in making a War with *France*, which was three to one against him in every respect, but in the Title, besides the disadvantage from *Scotland*, that lay continually beating upon his Rear. The like may be observed of his War with *Scotland*; in both which he evidently telleth the World, that he held it unreasonable to enter upon the managing of an offensive *Foreign War*, without the concurrence of the common consent of the People; and that not only for the thing it self, but also for his own Personal Engagement in the Service. For a King, though he be the *Generalissimo*, yet is he so from the People; and his Person being of that high value, is not to be exposed to every occasion that may provoke War, without due advice first had with the *public Council*; because in his Person the People adventureth as well as himself. And in this manner were the Wars in *France* by *Edward* the Third, and in *Scotland*, concluded upon debate. In the next place, as touching the *Arrays* of Men for War, I find no foot-steps of any power which was claimed as peculiar to the King therein, and acknowledged by the Parliament; but many instances

Instances do I meet with in the opposite; all which do plainly tell us, that the old shifts of *Jurati* and *Obligati ad arma*, could do little either in the calling of men forth, or arming them for the War. But in case of publick defence against Foreigners, men were summoned upon their *Legiance* as anciently was used. And this was by both King and Parliament fully declared, and all such Obligations by writing called in and damned as dishonourable to the King. In foreign-service the course was no less regular: if the War was by special direction of the Parliament, they likewise ordered the manner of the raising of Soldiers, viz. so many out of a County, and so many out of a Burrough; all which are by the express words of the Statute said to be granted by the *Knights* and *Burgeses*.

But if it was only upon the King's particular instigation, and not by order or consent of the Parliament, the King in such cases being *Voluntier*, all the Soldiers were so in like manner; unless some particular Law or Tenure otherwise obliged them. As touching the arming of Soldiers, the Law was yet more certain and particular. If the Soldiers were men of Estate, they were armed according to the ancient rule, asserted by the Statute at *Winton*; or otherwise were especially assessed by the Parliament, or by virtue of their Tenures. The first of these is confirmed by *Edward* the Third in Parliament, wherein he willeth, that no man shall be urged to arm himself otherwise than he was wont in the times of his Ancestors Kings of England. The two latter were likewise confirmed by another Law, made in the same King's time, whereby it was ordained, That no man shall be constrained to find Men of Arms, Hoblers, nor Archers, other than those which hold by such services, if it be not by common consent and grant made in Parliament: By Men of Arms, meaning those which we now call *Guirassiers*, or compleat armed; by Hoblers, meaning those now called *light Horse-men*. The Archers served on foot, and were principally armed with Bows, although they had also Swords, or other such offensive portable Weapons.

The first of these concerneth only the arming of a man's own person, the other the finding of Soldiers, and arming of them, and both together sufficient for the safeguard of the Rights and Liberties of the People, invaded in those times by Commissions of *Array*, and such other expressions of Prerogative Royal: for as touching the arming of a man's own person, the Statute of 1 *Edward* III. formerly mentioned, is clear in the point. And though the Statute of 25 *Edward* III. doth not in the latter direct, as touching the finding Arms for others, as is urged in his Majesty's Answer to the Declaration of the Parliament concerning the Commission of *Array*, July 4. 1642. yet is it therein granted, that a *compleat Soldier* is within the Letter of the Statute; and seeing the person of the Soldier is not in the power of any private person in such cases to command him to the service, it seemeth clear to me, that the Statute must intend the arming of him with *compleat Arms*, and not the armed person of the man. The Soldiery thus arrayed, they are in the next place to be called to their Rendezvous; the Knights by *Summons* sent to the Sheriff, but the rest by *Proclamation*. If the *Knights* appear not, a *Fine* is set upon them; if others run away from their Conduct, a *Writ* issued to the Serjeant at Arms to apprehend them: if they were not arrayed, then the Recognizances of such as undertook the work, are estreated. All plunder or spoil committed by the Soldiers in their Conduct was to be satisfied by the *Conductor* or Commander that

50 E. 3. n. received their Pay, or Charges for their *Conduct*. And although the Charges for
 62. *Conduct* had formerly *de facto* been defrayed sometimes by the County by virtue of
 Commissions that issued forth, both for the raising and *conducting* of them; yet
 this was no rule, nor did *Edward* the Third claim any such duty, but disclaimed
 1 E. 3. c. 7. it; and ordained by Act of Parliament, That both the *Pay* and *Conduct*-money
 should be disbursed by the King, from the time of their departure from their seve-
 18 E. 3. c. 7. ral Counties. For to this end, and for the safeguard of the Realm, and for the
 maintenance of the Wars of *Scotland*, *France*, and *Gascoign*, the King had sup-
 14 E. 3. Stat. ply from *Aids*, *Reliefs*, *Wardships*, *Marriages*, *Customs*, and *Escheats*: Nor did
 2. cap. 1. the Parliament grant any particular *Aid* by the Assessment or publick Tax, but
 when they evidently saw the burthen of *War* to be extraordinary; as it befel in the
 Conquest of so great and potent a Realm as *France* was. Wherein although the
Taxes were many, yet so well ordered were they, and with that compliance from
 the King, that the people endured them with much patience, so long as the King
 lived. Lastly, in all these Cases of *Foreign Wars* (for of such Cases only these
 8 E. 3. Stat. Laws are to be understood) it was especially provided, *That no man should be di-*
 2. cap. 5. *strained, or urged against his will, to go out of his County.* But in case of *defensive*
War, the course was otherwise: for all men in such cases are bound by the Law
 of Nature to defend their own Country from Invasion, in order to the safety of their
 own Estates and Habitations. They were *arrayed*, or gathered together by *Commission*
of Array from the King, armed according to the Laws formerly mentioned, and
 not by Arbitrary Order of the Commissioners. And by virtue of such Commis-
 sions, they were drawn forth and led to places where need required. Sometimes
 to one Coast, sometimes to another, yet not altogether at the King's pleasure: for
 the Parliament upon occasion set rules of Restriction, and generally exempted the
 23 E. 3. n. *North Parts* beyond *Humber*, from being drawn *Southward*, and left them as a re-
 18. serve for the defence of the *Marches* bordering upon *Scotland*; and sometimes or-
 20 E. 3. n. dered the *Array* should be executed only in some particular Counties, and other
 14. times wholly exempted the County adjacent, within six miles of the Sea-coast.
 And because the King might under colour of a defence, *array* the people, where
 no such occasion led the way, and command them out of their Counties, a Sta-
 1 E. 3. Stat. tute is made that states the Case wherein such *Array* shall be; the words whereof
 2. cap. 5. are variously set forth in the Books in print, whether determinatively, or carelessly,
 I cannot tell; but all of them do differ in sense one from another, and from the
 Truth.

Some of the common Books have the words thus: *None shall be distrained to*
go out of their Counties, unless for cause of necessity, and of sudden coming of Stran-
gers or Enemies into the Kingdom. Others read it thus: *But where necessity re-*
 442. *quireth, and the coming of strange Enemies into the Kingdom.* The King's Answer
 to the Parliament's Declaration concerning the *Commission of Array*, would read
 it thus: *Unless in case of Necessity, or of sudden coming of strange Enemies, &c.*
 But the words in the Roll are these: *Et que nulls ne soient distresses d'aller hors de*
les Countees, si non pur Cause de necessity, de suddaine venue des strange Enemies en
Reyaulme. In *Englsh* thus, word for word: *And that none be distrained to go out*
of the Counties, if not for cause of Necessity, of sudden coming of strange Enemies
into or in the Kingdom: which words determine the point, That none shall be
 by

by *Commission of Array* drawn out of their County, but in case of necessity. And secondly, that this case of necessity, is only the coming of strange Enemies into or in the Kingdom; so as probably the Invasion must be actual, before they be drawn out of their Counties, and not only feared; and it must be a sudden Invasion, and not of publick note, and common fame foregoing; for then the ordinary course, either of Parliament or otherwise, must be used to call those that are bound by Statute or Tenures, or Voluntiers, to that service, seeing every Invasion is not so fatal as to require a Commission for a General Array. Against what hath been thus noted, the judgment of Sir Edward Coke in Calvin's Case lies yet in the way, who affirmeth, that the Subjects of England are bound by their Legiance to go with the King in his Wars, as well within the Realm, as without; and this Legiance, he telleth us, is that natural Legiance which, he saith, is absolute and indefinite, &c. and not local; which if not so, then were not the English bound to go out of England; an inference that is neither necessary, nor is the thing affirmed certain. It is not necessary, because Englishmen may be bound to go out of England, by virtue of their Tenures, particular Contract, or else by special Act of Parliament, and not by virtue of that natural Legiance which in truth is nowhere.

Now for the maintenance of the point, the Reporter alledgeth two Statutes affirming the thing and common practice; and lastly, Authorities of the Judges of the Common Law. As touching the Statutes, one in Henry the Seventh's time, and the other in Edward the Sixth's time, I shall speak of them in the succeeding times, when we come at them, for they are no Warrant of the Law in these times whereof we now treat; much less is the modern practice of these later days, a demonstration of the Law in the times of Edward the Third, nor of the nature of the Law in any time, seeing that it is obvious to times, as well as particular persons, to do and suffer things to be done which ought not so to be; and therefore I shall for the present lay those two Considerations aside. But as touching the Opinions of the Judges of the Common Law, two Cases are cited in the Affirmative, which seem in the Negative; and the rest conclude not to the point.

The first of the two Cases, is the opinion of Justice Thirning in the time of Henry the Fourth, word for word thus: *A protection lies for the Defendant in a Writ upon the Statute of Labourers, and yet the Defendant shall not have such matter by way of Plea, viz. That the King hath retained him to go beyond the Sea: for the King cannot compel a man to go out of the Kingdom; that is (as the Reporter saith) Not without Wages*; intimating thereby, that if the King shall tender Wages to any Man, he must go whither the King shall please to send him; which is not only destructive to the opinion of Thirning concerning the Plea; but also (though granted) is destructive to the Reporter's Judgment in the main point. For if an Englishman may refuse to go without Wages, then is he not bound to go by any natural absolute Legiance, as the Reporter would have it. And as touching the second Case, which is Bigot's and Bobun's Case, it cleareth the same thing; for it was resolved, that they ought to go but in manner and form according to the Statutes; then is not the ground in the absolute Legiance, for that is not qualified, but in the positive Statute-law, which tieth only in manner and form, and that by voluntary consent in Parliament.

The rest of the Cases do neither conclude the main point, nor the particular thing that the Reporter intendeth: For he would imply to the Reader, that Eng-
lishmen

¹² H. 7. c. 1.
² E. 6. c. 2.

⁷ H. 4.
Protect. 1. c.

²⁵ E. 1.
Daniel's Hill.

²⁹⁴

liffmen were anciently used to be *imprest* for the Wars in France: and hereunto he voucheth one Authority out of ancient Reports of Law in *Edward* the Third's time, one Authority in the time of *Henry* the Fourth, and three in the time of *Henry* the Sixth; none of all which do speak one word concerning *Impresting*. And that in *Edward* the Third doth imply the contrary; for the Case is, that in a *Præcipe quod redibat*, a Protection was offered by the Defendant, as appointed to go beyond the Sea with the Duke of *Lancaster*; and the Plaintiff's Counsel alledged, *That the Defendant had been beyond Sea with the Duke, and was returned*. To this the Defendant's Counsel answered, *That the Duke was ready to return again*; and for this cause the Protection was not allowed. Yet a *Quære* is made upon this ground, that it might be that the Defendant would not go over with him, nor was it proved that he would; which sheweth plainly, the party was not *imprest*; for then the thing had not been in his power to will or nill.

44 E. 4. fol.
12.
12 H. 4. 7.
32 H. 6. fol.
4.
17 H. 6. Pro-
tect.
19 H. 6. 35.

The last instance that the Reporter produceth, is that of *Forinsecum Servitium*, or *Foreign Service*, and that seemeth to be *Knight-service* to be performed abroad. But this falleth short of the Reporter's intention in three respects.

First, Though it belongeth to the King, yet not to him only, but to other chief Lords; so saith *Bracton*.
Br. 1b. 2. fol. 36, & 37.

Secondly, It is not due from every *Englishman*.

And lastly, It is a *Service* due by virtue of *Tenure*, and then the Conclusion will be, That which is due by *Tenure* of Lands, is not due by *natural* and *absolute Legiance*: and so this *Foreign Service* arising meerly by *compact* and agreement between Lord and Tenant, and not by the *natural duty* of an *English-born* Subject, (which is the thing that the Reporter drives at in all his discourse) will be so far from maintaining the Reporter's opinion, as it will evidently destroy the same.

And thus the posture of this Nation in the Field remaineth regular in the rule, whatever hath been said against it; notwithstanding that in the very instant of Action there may be some irregularity, which no doubt both was, and ever will be, in stormy times. Nor did it conquer the Law: For though *War* may seem to be but a sickness of the State, yet being in truth, as the *Ultimum refugium*, and only reserve unto Law, beaten to a retreat by oppression; it is no wonder if this motion, or rather commotion, that brings on the Law of Peace in the Rear, be still and ever subject to a rule of Law, how unruly soever it self seemeth to be. Now because *Law* imports execution, and that presupposes a Trial, and it a Court; therefore did our Ancestors (amongst other Courts not regulated by the Common Law) form a Court for the service of *War*, called the *Court-Martial*, or the *Constable's Court*, according as the Office of one or the other had the preheminance. The proceedings herein were ordered, as I said, not according to the Common Law, for that is like the Land, much distant from all other Nations; and the Negotiation of this Island with other Nations (as in time of Peace, so of War) requires a rule common to all those Nations, or otherwise no Negotiation can be maintained. And for this cause the proceedings in this Court were ever according to the rule of the *Civil Law*. The work of this Court is principally Judicial, and in some cases Ministerial.

The first reflects upon Causes Foreign and Domestick, and both of those are either

either criminal, and such as concern the common Peace, of the place of *War*, or more civil, relating only unto private interest. As touching the *first* of these, I suppose it is no Bull, to speak of a *common Peace*, in the place of *War*. For a *common Peace* must be each party within it self, or otherwise no party at private variance can subsist within it self, much less make *War* with the other; and therefore in order unto *War*, there must be a *Law of Peace*, for the Trial of Offenders, and punishing them for offences committed against the good Government of the *War*: Such as are *breaking of Ranks, deserting the Standard, running away from the Colours, Mutinies, Murders, Rapes, Plunderings, private Quarrels, Disobedience to command, and such-like*; all which do bear the shew of crimes against the *common Peace* of the Army and the Country.

Of the *second* sort, are matters concerning *Quarter*, and Contracts in order to the government of the *War*, saving such as are made before either part be inrolled for the *War*. For if a man doth covenant to serve in the *War*, and keepeth not his day at the first Rendezvous, he is to be attached by Writ at the Common Law. Causes *Domestical* likewise fall under the like division: for whatsoever cause may be *Foreign*, may also be *Domestick*; because the Army is ever embodied within the Kingdom, and must be under the Directory of the *Martial Law* upon the first forming thereof. Now though the particular Laws of the Army, for the government thereof, be ordinarily according to the prudence of the General, yet certain Fundamentals have been *ab Antiquo*, made by Custom, and the Parliament, against which the course of Judicature must not go. And as the Parliament saw need, it set also particular directions; as for the payment of *Soldiers Wages*, for remedy of wastings and *plunderings* in their own Country, and other such emergencies. But the execution of all these Laws originally was in the *Marshal* of the Army. And because that the Army was generally dissolved, or such persons engaged in such matters of controversy departed from the Army before the same were concluded, therefore the *Marshal's-Court* continued, in order to the determining of these matters. And in continuance of time, other matters also crouded into that Society, although sometimes under the Directory of the *Constable of England*, as well as at other times under the *Marshal*; more particularly, that power of determining matters concerning *Torniaments*; a sport that like a *Sarcasm* tickles the fancy, but wounds the heart; and being of as little use in a Commonwealth as of benefit, therefore is laid aside; nor need I to speak any more concerning it. There is one thing more somewhat like a *Torniaments*, but that it is in good earnest, and that is called *Duel* *. This cometh likewise within the Cognizance of this Court, but in a Ministerial way, and as subservient to the Common Law, in cases of Appeal and Right. Hereof needs likewise little more than the naming, and therefore I shall leave the Reader, that would understand the particular managing thereof, unto the discourse compiled by the Duke of Gloucester in *Richard the Second's* time.

Lastly, As touching the antiquity of this Court, though it may be great, yet the power thereof was doubtful, and scarce taken notice of in any publick Act of State, till about these times; whenas a complaint was made by the Commons for the encroachment of that Court upon the Liberty of the People; and bounds of the Courts

13 Rich. 2.

Stat. 1. c. 20.

8 Rich. 2. n.

31.

8 Rich. 2. c.

5. Regist. fo.

194. 2.

50 E. 3. n.

33. n. 161.

3 R. 2. n. 27.

* i. e. Trial

by Battail.

Gloss. 129.

Of preserving the Peace, during

Courts of Common Law. Nor is it strange, that such unquiet times brought forth such Precedents: but much more strange, that the *Common law* held up its head against such violent irruptions of *War*.

C H A P. XII.

Of the Peace.

YOU have seen the Kingdom in Armour, now see it in Robes, and you will say that its Majesty therein is as grave, as it was in the other brave. It is true, the tempers are so contrary, as it may be wondred how one and the same should be wise and willing for both: but when God will do much, he gives much, and can make a People as one man, like unto *Caleb*, fitted both for *War* and *Peace*. Besides, the Times were now much conducing hereto. It is vain to endeavour to allay Humours in the Body which are maintained by Agitation; they must be purged out, or the whole will still be endangered: and therefore, although Kings hitherto did endeavour to establish a peaceable Government, yet being led by ill Principles of private Interests, they laboured to little purpose. But now the Scene is altered, and one wise moderate King, that was as wise as valiant, did more than they all. And first set a rule upon his own desires, contenting himself with the condition of an *English King*; and then upon his people, making them contented with the condition of *Englishmen*.

The order herein was no less observable; for the former wrangling Times having trained up the minds of men in a tumultuous way, nor could they skill to pace in the steps of *Peace*, the King led them into Foreign Parts to spend their heat, till being either weak or weary, they are contented to return home, and study the happiness of a quiet Life. These men thus ordered, the rest at home are made more cool, like a Body after Physick, and all are now contented to submit to Law and Magistracy. A fitting time now it was for *Justices of Peace* to come upon the Stage in their best garb. For though the work was more ancient, yet like some loose Notes laid aside in several places, it was not to be found, but at a distance, and after a long delay. But *Edward* the Third sums up all into one brief, and brings a compleat Model thereof into the World for future Ages to accomplish, as occasion should lead the way. The course was now established to have Justices settled in every County, there to be resident and attending that Ser-

1 E. 3. c. 16.

1 E. 3. n. 5.

17 E. 3. n. m.

1 E. 3. c. 6.

18 E. 3. c. 2.

34 E. 3. c. 1.

1 R. 2. c.

10.

vice. First, they were named *Guardians*, or *Wardens of the Peace*; but within a few Years altered their Title to *Justices*. First, they were *chosen* out of the good and lawful men of each County: After that, they were two or three *chosen* out of the worthiest men, and these were to be joined with Lawyers. Then was one Lord, and three or four in each County of the most worthy men, adjoined with *Lawyers*. Afterward, in *Richard* the Second's time, the number of the *Justices* in each County might attain to the number of six, and no Steward, &c. of any Lord to be admitted into the Commission; but within half a year

year all is at large, so be it that the choice be out of the most sufficient *Knights, Esquires, and Gentlemen* of the County. Again, within two years, the number in each County is set at Eight; yet in all these the *Judges* and *Serjeants* were not reckoned, so as the work then seemeth not so much as now-a-days, although it was much of the same kind; and yet it grew up into that greatness which it had by degrees. Before they were settled by *Edward* the Third, there were *Custodes pacis*, which might be those whom we now-a-days call the *High Constables* of the Hundred, whose work was purely Ministerial. [*Quare*, if not Judicial, as Conservators of the publick Peace.]

About the second year of *Edward* the Third, the *Guardians* of the Peace had power of *Oyer* and *Terminer*, in matters of *riding armed*, upon the Statute 2 *Edw.* 3. After that, they have power of enquiry by *Indictment* in certain Cases; within four years after, they have power of *Oyer* and *Terminer* in Cases of *false Jurors*, and *Maintenance*: and about ten years after that, they obtained like power in matters of *Felony* and *Trespass*. The way of *Commissions* in case of *Life* and *Member*, thus opened, another occasion of *Commission* offers itself for a determinative power, in case of offences against the Statute of *Labourers*; and the Cognizance hereof is soon settled upon *Commissioners* in the Counties specially chosen for that Service; which questionless, as the Times then stood, was as commendable a work as it was necessary. For *Soldiers* were so many, that *Labourers* were very few; and those that once are accustomed to Arms, think ever after meanly of the Handicraft; nor will they ever stoop thereto, after their Spirits are once elevated by mastery of Adventures. And secondly, those few *Labourers* that remained of the Sword, Plague, and other disasters of these wasting times, understood their advantage, and set a value upon their Labours, far above their merit; apprehending that men would rather part with too much of a little, than to let their work lie still that must bring them in all they have. But these *Commissioners* lasted not long, though the work did. The *Justices of Peace* are looked upon as meet for that service; and it is a vain thing to multiply *Commissions*, where the work may be done by one, that before this time had obtained an additional Cognizance of all Causes of *Riots, Batteries, wandering dangerous Persons, and Offences in Weights and Measures, and in Purveyance*. To them, I say, all this work concerning *Labourers* is also committed by the Parliament; and herewith a way was laid open for Crimes of greatest regard under *Felony*, to be determined by Trial in the Country, according to the course of Common Law.

The issue of all which was, not only ease to the people, but a great escape from the rigour of the *Council-Table* in the Star-chamber, and the King's Bench at *Westminster*, on the one side; and also from the gripe of the *Clergy* on the other; who hitherto held the Cognizance of the Markets in *Weights and Measures* to themselves. This Model so pleased all men, that *Richard* the Second, that was pleased with nothing but his own pleasure, gave unto the *Justices of Peace* yet farther power to execute the Statute at *Northampton* against *riotous ridings*, and to settle the Wages of *Labourers* and Servants, to punish unlawful *Huntings* by the meaner sort of people, and *Regrators* of *Wool, false Weights* in the Staple, unlawful wearing of *Liveries*, and unlawful *Fishings* contrary to the Statute at *Westminster* 2. Thus was the power of *Justices of the Peace* grown to that height in these and other things, that it undermined, not only the *Council-Table* and King's Bench, but the *Commissions* of *Gaol-delivery* and of *Oyer* and *Terminer*; so far

Of preserving the Peace, during the

forth, as their work was much less than formerly. For Neighbours, in cases of crime, are better trusted with the Lives and Estates of men, than Strangers; so as in all this, the people are still the gainers.

The manner of Judicature by these *Justices of the Peace* still remains: nothing appears by any Statute in these times, that one *Justice of the Peace* might do alone, but record a *forcible Detainer*; although questionless, in point of present security of the *Peace* and good Behaviour, by the intent of the Statutes he might do many things; but in Cases of *Oyer* and *Terminer* all must be done in *publick Sessions*, which the *Justices of the Peace* had power to hold by *Commission* only, until the thirty-sixth year of *Edward the Third*: and ever after that, they held their *Sessions* by virtue of the *Statutes*, and had power to determine divers things in their *Sessions* according to discretion. These were remedies after the Fact; now see what preventing Physick these times afforded.

One thing that much irritated the spirits of men into discontents, was *false News*, or slanderous reports, raised and spread amongst the great men. For in these Times the Lords were of such a considerable power, as the vexation of one Lord, proved the vexation of a multitude of the meaner sort. And though the Statute of *Westminster* the 1. formerly had provided against such Tales, yet it touched only such as concerned *discord between the King and People*, although by implication also it might be construed to extend farther. But *Richard the Second*, willing to live in quiet, that he might enjoy his pleasure, would have the people know their duties in plain words, and agreed to a Law, That all such as published such *false News*, tending to sow strife between the Great Men*, should be imprisoned until the first Mover was found; and if he were not found, then the *Relator* should be punished by advice of the *Council*: So much power was then given to the *Council*, whatever it was.

Thus the seed was choaked, or was so intended to be, though every passion was not thus suppressed. For some angers conquer all fear, and will hold possession come what will. In the next place therefore, provision is made against the first Actings in sorting of parties by Tokens and *Liveries*; utterly inhibiting the meaner sort of the people from giving of *Liveries* to maintain quarrels, upon pain of Fine and Imprisonment, and the Trial to be before the *Justices of Assize*; which it seems was in affirmance of former Laws, as by the Preamble of the Statute doth appear, though the Laws themselves are not extant. About fifteen years after, it was by sad experience found that the Lords maintained quarrels by multitude of *Liveries*; and therefore another Law was made, inhibiting the Lords to give *Liveries* to any but their menial Servants: and it is ordered, that the *Justices of the Peace* shall make enquiry of such offences, and punish them according to their discretion.

A third prevention was provided against gathering together of Parties, after they are sorted: For the humours may so abound, as nothing will keep them in; they must either break out into a sore, or a long sickness of State will certainly follow. To this end therefore, the Statute made at *Northampton* is again revived, expressly forbidding all persons to *ride armed*, unless in some particular cases, of executing Justice, or guarding the Person of the King, or his Justices, and such-like. And if men will be so adventurous as to out-dare Law by publick force, Troopings together, and riotous Ridings, another course is taken, not by *Commission*

* Not. These Statutes were made on occasion of a Quarrel between *William Wickham* Bishop of *Winchester* and *John of Gaunt*, who had been scandalously reflected on by *Wickham* and his Clergy, even in their Pulpits, See *Wickham's Life*.

of the Peace, but rather of War, directed unto valiant persons in every County, and they have power thereby to apprehend such Offenders, and imprison them until the Gaol-delivery, though no Indictment be found thereof, until the Gaol-delivery shall be. By this *Commission* therefore power is given of *Posse Comitatus*, in nature of a *Commission of Array*, with an additional power of fighting and destroying; so as though the King granteth the Power by the *Commission*, yet the Parliament giveth the Power to the *Commission*: and be it a *Commission for Peace*, or *War*, it is originally from that Power.

The fourth and last prevention, was the taking away means of continuance and supporting such Riotous ways, viz. *Castles and Gaols out of the Custody of private hands*, 13 R. 2. c. 15. and restoring them to their Counties. For *Gaols* and *Castles* are taken promiscuously for places of security, in times of Peace to keep ill persons from going out, and in times of War from getting in. Amongst these, some belonged to the King, and were committed to such as he favoured, who commonly (in such times of Oppression and Violence) grew too big for Justice, usurping a *Gaol-delivery*, and making such places of strength, many times, even to the innocent, a Prison to keep them from the Law; but unto guilty persons, an *Asylum* to defend them against the Law. And these thus belonging to the King, were under no Law, but of *Prerogative*; whereas other *Castles* of private persons were under the yoke of the *Statute*, 13 E. 1. For remedy of all which, the King's *Castles* are once more returned to the *Sheriff's* Custody, by Act of *Parliament*; who questionless have the power to dispose of all places of strength, whether in order to *Peace* or *War*; and could not dispose them into a more safe and indifferent hand than the *Sheriff's*, who is as well the *King's Officer*, as the *Kingdom's Servant*; and much intrusted by the *Law*, in the execution of its own power. And thus is this Nation now prepared for a settled *Peace*; a condition that is long in ripening, and soon rotten, unless it be well fenced and over-awed by a good Conscience. But *Richard* the Second was neither so good, nor so happy; his Heart affected to be high, but his Head could not bear it; he turns giddy, and runs far wide. Those that would reduce him, he enforces into foreign Countries; and himself holds on his career over Hedge and Ditch into *Ireland*; where under pretension of holding possession of that Kingdom, he lost *England*: and whilst he plays his game in that Country, another plays *King* by your leave, in this, and steps into the Throne; teaching the King thereby this Lesson, though too late; *That Non-residency is dangerous for a Priest, but unto a Prince fatal, unless his Subjects be fast to him when he is loose to them.*

C H A P. XIII.

A summary View of the Courses of Henry the Fourth, Henry the Fifth, and Henry the Sixth, in their several Reigns.

* & c. The de-
throning of
R. 2.

HE that played this prank*, was the banished Duke of *Hertford*, Son of *John of Gaunt*, and by his death now become Duke of *Lancaster* by Title; and as the Times then were, it proved not hard to get more. For in uncertain Commonwealths, it is an easy thing for a man of opinion, that hath less than his due, to get more than he ought. As Son of *John of Gaunt*, this Duke had the people's good wishes: he (a wise and a brave man, and under oppression) gained the more upon the people, by how much they love brave men, and compassionate such as suffer wrong; especially from such persons from whom they all found the like measure. All these concurring with the King's absence, invited the Duke to adventure himself upon the influence of the people's favour, to gain his own right, and what more the people would allow him; and if no more, yet his Honour is saved; he came for his own, and attained his end.

† to the
Crown.

Thus then he comes over without Army, or foreign Power, or other help, saving the advice and interest of Archbishop *Arundel*, who was his Companion in suffering, Partner in the Cause, and no less welcome to the Clergy, than the Duke himself was to the people; and so gained power to the Duke, though he brought none. Upon their arrival, the Aspects of all are benign, the Dukedom waits for him; and in that, as in a Mirrour, he beholds the way fair and easy†; yet further, it pities him to see the Kingdom so torn in pieces and spoiled. The people knew him able, and hoped him willing to amend all: they offered him their Service; which he accepts, and therewith the Crown. So hard a thing it is for to put a stop to a Conqueror in his career.

By this time was the Duke of *Hertford* thus become Duke of *Lancaster*, and King of *England*, under the name of *Henry* the Fourth, by a design that in the proof was more easy than commendable: and which being effected, cost more skill to make that seem fair which was so foul, than to accomplish the thing. He therefore first heaps together Titles, enough to have buried the clamour of Usurpation, if it would have succeeded. Conquest was a Title freest from Dispute whilst Power holds; but it looks better from a foreign Enemy, than one sworn to the *English Crown*; and therefore after that had served his turn, he disclaimed it; as that which was, though meet enough to have, yet unmeet to hold.

His right by Designation from his Predecessor he glanced upon, but durst not adventure it too deep into the people's consideration, whose Ancestors had formerly over-ruled the Case against King *John*. He then stayed upon a concealed Title from a concealed Son of *Henry* the Third, of whom they who listed might be persuaded, but few believed the thing, nor did himself; but thence takes his flight up to a *Jus Divinum*, or some hidden Fate that called him to the work; but even there his Wings failed him, and so he falls flat upon the *People's Election*, *De bene esse*. Some of these, or all together, might make Title enough for a great Man

Man that resolved to hold by hook, what he had got by crook; and therefore trussing them up all together, he enters his claim to the Crown, *As coming from the Blood Royal from King Henry, and through the Right that God his Grace hath sent me; with the help of my Kin and Friends to recover the same, which was in point to be undone for want of good Governance, and due Justice.* The extract of all is, that he was chosen by the People and Parliament then sitting. And albeit that by the Resignation of Richard the Second, the Parliament might seem, in strict construction of Law, to be expired, together with the King's power who called them together; yet did not that Parliament so apprehend the matter, but proceeded not only to definitive Sentence of *deposing* him, but declared themselves by their Commissaries, to be the *Three States*, and *Representative* of the People of *England*; maintaining thereby their subsistency by the consistence of the Members together, (although their Chief was for the present like a Head in a Trance) till they had chosen *Henry* the Fourth to succeed to the Throne; by this means preventing the conceit of discontinuance in the very Bud of the Notion.

Much like his entry was his continuance, a continual tide of Foreign and Domestick War and Conspiracy, enough to exercise his great Courage; although he was more wise than warlike, being loth to take up Arms; (for well he knew, that a sick Title never sleeps but in a Bed of Peace) and more loth to lay them down: For besides Victory, whereby he gained upon his Enemies in time of War, he knew how to make advantage of them in time of Peace, to secure his Friends, to keep others in awe, to enforce such Laws as stood with reason of State, and the present posture of Affairs: and where Laws failed, to fill up the period with Dictates of his own Will. And upon this account the Product was a Government full of Ulcers, of Bloodshed, without regard of persons, whether of the *Lay* or *Religious* Order, without *Legal Trial*, or *Privilege of Clerk*. So was Archbishop *Walden* dethroned, Archbishop *Scroop* put to death, and Dukes were dismounted without Conviction or Imputation, saving of the King's displeasure. Taxes multiplied, and although begotten upon the Parliament, were like some monstrous Births shewn to the World, to let it know what could be done; but concealed by Historians, to let it know what may not be done. Yea, the *Privileges* *Walsing.* of Parliament invaded in point of *Election*: A thing that none of his Predecessors ever exemplified to him, or none of his Successors ever imitated him in. Nor had he purposed it, but that he was loth the People should know more of the Government than needs must.

To keep off Foreign Troubles, he made Peace with *France* for longer time than he lived; yet was ever infested with the Sword of *St. Paul**, in behalf of *Richard* * a French Earl. the Second's Queen; and with the Factions between the Houses of *Orleans* and *Burgundy*, in which he had interested himself to preserve the Foreign Neighbourhood in Parties one against another, that himself might attend his own security at home. He would have moved the *Scots*, but they were already under *English* Banners; nor could he reach so far, having so many Enemies even in his own bosom. The *Welsh* were big with Antiquity, and Mountains of Defence; they begin to bethink themselves of their Antient Principality, hold the King's Arms at hard duty, till by Laws enacted in Parliament, they lost their Liberties of bearing ^{2 H. 4. c. 12.} *Office Ministerial*, or of *Judicature*, of *holding Castle*, of *Convention* without the ^{4 H. 4. c. 26.} King's Licence, yea, of *Purchase*; and so by degrees were brought down from ^{32. & c. 19.} ^{20, 28, 31.}

the height of a *Free Principality*, to be starved in their power, and inferiour to a *Free People*. And thus the *Welsh* on the one side, the *discontented Lords* on the other, and *Mortimer's Title* in all, so busied the King, as though he lopped off the Tops as they sprang up, yet they sprang forth as they were lopped; nor was it the King's lot all this while to find out the root of All, or to strike at that.

Lastly, when time had made all Troublers weary, yet he still sits upon Thorns; he was jealous of his Subjects, jealous of his Son, yea, jealous of himself: it being ever the first and last of his thoughts, how to keep his Crown. For the most part of his Reign, he was troubled with the walking Ghost of *Richard the Second*; ever and anon he was alive, he was here, he was there, and so the people's minds were always kept at random; but when all these Spirits are conjured down, *Richard the Second's Ghost* is yet within *Henry's* own breast. So ruled *Henry the Fourth*, an unbappy confident man, that durst undertake more than he would, did more than he ought, was successful in what he did, yet never attained his end, to be sure of his Crown, and quiet of mind. For a Plaister to this Sore, he turned somewhat towards Religion; but shewed it more in zeal to Church-men, than in works of Piety: and therefore may be thought to regard them rather as his best Friends in right of Archbishop *Arundel*, than as in relation to Religion. Yet, as if he overlooked that, he desires their Prayers, becomes a strict observer of superstitious Rites, is fiery zealous against the *Lollards*, intends a Journey into the *Holy Land*, and War against the *Infidels*; the common Physick of guilty Kings in those days. Briefly, he did will to do any thing, but undo what he had done; and had done more, had his Journey to the *Holy Land* succeeded. But (whether hastned or delayed by a Prophecy of the ending of his days, falls not within my Pen to censure;) entring upon the Work he died, in the beginning of his purposes, in the midst of his fears; never came to the *Holy Land*, and yet yielded up his last breath in *Jerusalem* *.

Hist. Eccles.
Ang. 618.

* i. e. The
Chamber so
called near
Westminster-
Abbey.

Henry the
Fifth.

The Parliament was then sitting, and was witness of the death of *Henry the Fourth*, as it had been of his entrance upon the Throne, as if purposed to see the course of the Crown in the doubtful current between the two Houses of *Lancaster* and *York*; and to maintain their own Honour, in directing the Scepter according to their warranty upon a late Intail by Act of Parliament. Yet did not all rest upon this: for the Heir of *Henry the Fourth* was a Man every inch of him, and meant not to moot upon the point: His Father died a King, and he his Heir had the Crown, and was resolved to hold it. A rough young man he had been formerly, and bold enough to out-face small doubts in point of *Succession*; for he could (for need) out-face common Civility itself. This might have lien in his way; for he that cannot govern himself, can much less govern a Kingdom. Yet a hidden providence concluded quite contrary, and rendred him a clear Testimony of a strange change by the anointing Oil, like that of *Saul*, that forthwith had the Spirit of another man. So though not hammered thereto by Affliction, as was *Edward the First*, yet was he his parallel in Government, and superiour in Success. Being seated on the Throne, all men thought it dangerous to abide the adventure of the Turn of this King's Spirit. The *Clergy* had but yesterday tried the Mastery with the *Laity*, and gained it but by one Vote: there was no dealing with the *Clergy* whilst Archbishop *Arundel* lived, nor with him whilst *Henry the Fourth* lived, or his

his Merits were in memory; but now they both are dead, the *Clergy* and the *Laity* are upon even ground. This might make the *Clergy* now not over-confident: The Lords looked on the King as a man like enough to strike him that stands next. The wise men saw he would be doing; all men were tired with Intestine Quarrels; and jumped in one, *That He* (i. e. Henry V.) *that would be in action, should act abroad, where he might get Renown, and a Purchase big enough for his Spirit.*

Scotland was a Kingdom yet incompetent to the King's Appetite. France was the fairer Mark, and better Game; and though too big for the *English* gripe, yet the Eagle stooped, and sped himself so well, as within six years he fastned upon the Sword and Scepter, and a Daughter of France, and might have seized the Crown, but chose to suffer a blur to lie upon his Title derived from *Edward* the Third, rather than to incur the censure of Arrogancy over a stooping Enemy, or to pluck the fruit from the Tree before it was fully ripe; which in time would fall into his lap by a better Law than that of the Sword: Otherwise it might be well conceived, that *he that hath both Right and Power, and will not seize, disclaims.* Besides, the King was as well Inheritor to his Father's Fate as Crown: still he had success, but the end was so far distant, that he died in the way thereto; the brave *Dauphin* of France maintaining War (after his Father the French King had yielded up the Bucklers to Henry the Fifth) till Henry the Fifth died, and the *English* did forgo what they had formerly gotten in France by the Sword of that great Commander. Nor did the *English* gain any thing in the conclusion of this War, but an honourable windy repute of being one of the five Chief Nations of *Christendom*, (if honour it be to be reputed amongst the Nations) a Conqueror of France, the chief Leader unto the dethroning of three Popes at once, the Election of Pope *Martin*, and of giving a Cure to that deadly Wound of the Popedom which had spent the blood of two hundred thousand men's lives lost in that Quarrel.

These foreign Engagements made the King less solicitous of the point of *Prerogative* at home; and the rather, because he knew the way to conquer his private Enemies Arms, and his Subjects Hearts; without loss of Honour in the one, or Reverence in the other. He loved Justice above the rank of his Predecessors, and in some respects above himself; for he advanced *Gascoign* for doing Justice, though to the King's own shame. -He liked not to intrude himself into *Elections*, and therefore, though requested by the Monks of *Canterbury*, he would not nominate a Successor to Archbishop *Arundel*, but left the whole work to them. In the Au-
thority of his place he was moderate, and where his Predecessors did matters with-
out the *Lords* consent; when he made his Uncle the Marquis of *Dorset*, Duke of *Walsing.*
Exeter, and had given him a Pension to maintain that honour, he asked the *Lords*

consent thereto*. To the *Clergy* he was more than just, if not indulgent; led thereto by his Father's example, as being wrapped up in the same Interest, as I conceive, rather than out of any liking of their ways, now growing more bold upon Usurpation than in former times. Or it may be, that having prevailed in that work in France, which to any rational man must needs appear above the Power of the King, and all the Realm of *England*; he looked upon it as more than human, and himself as an instrument of Miracles. And was stirred up in his Zeal to God, according to his understanding in those dark times, to give the *Clergy* scope, and to pleasure them with their liberty of the *Canon-Law*, that began now to thunder with
Fire

* Note, by the ancient Constitution the House of Peers had the Right of investing the Members of their own Body.

Antiq. Brit.
285.

* i. e. By passing the Act
de Hereticis
comburendo.

Fire and Terror in such manner, that neither greatness nor multitude could withstand the dint; as was evidenced in that Penance inflicted upon the Lord *Strange* and his Lady in case of Blood-shed in *Holy Ground*; and their hot pursuit of the Lord *Cobham* unto a death of a new nature, for somewhat done which was sometimes called *Treason*, and sometimes *Heresy*. And thus became *Henry* the Fifth baptized in the Flames of the *Lollards*, as his Father had sadly rendered up his spirit in the same *. I say, in this he is to be looked upon as one misled for want of light, rather than in opposition against the light: For in his last Will, wherein men are wont to be more serious and sincere, amongst his private regards, he forgets not to reflect upon Religion to this purpose. *We further bequeath* (saith he) *to the redundant Mercy of the Most Excellent Saviour, the Faith, Hope, and Charity, the Virtue, Prosperity, and Peace of the Kings our Successors, and of our Kingdom of England; that God for his goodness sake would protect, visit, and defend them from Divisions, Dissensions, and from all manner of deceitfulness of Hereticks.* And thus the Piety, Justice, and Moderation of *Henry* the Fifth, adorned and crowned the Honour of his Courage and Greatness, with that honourable Title of *Prince of Priests*: And had he been blessed with a clearer light, he might as well under God have obtained the Title of *Prince of Princes*, wanting nothing that might have rendered him a Precedent of Fame.

Henry the
Sixth.

But the time is now come, that the Tide of *England's* Glory must turn, and the sudden Conquest in *France* by *Henry* the Fifth, not unlike the *Macedonian* Monarchy, must disgorge itself of what it had hastily devoured, but never could digest. Three things concurred hereunto; one dangerous, the other two fatal to the flourishing condition of any Nation.

First, The King is a *Minor* in the least degree that ever any Prince sate on *English* Throne. He entred thereinto, neither knowing what he did, nor where he was; and some say, he sate therein in his Mother's Lap: for his Life had been more in the Womb than abroad. A sad presage of what followed! for many men think that he was in a Lap all his days. Nor are the chief men to be blamed herein: for it is a certain Truth, That it is much better that the Election of a King should be grounded upon a Rule that is known, though it be by descent of Inheritance, than upon none at all. For if a *Child* should succeed, or a *Lunatick*, yet where the Principle of Government resteth upon the *Representative* of the People, there is the less cause of Complaint; the Government being still the same, both for Strength, Wisdom, and Uniformity, though it may be the Nation not so active and brave: For a Commonwealth can admit of no *Minority*, though a Monarchy by descent may.

Secondly, This deficiency in Nature might have been supplied, but that these times were unhappy in the great power of the Lords; to please whom, the Government is parcelled out into two shares: One is made *Protector* of the King's Person, the other *Protector* of the Kingdom: too many by one: For let their persons be never so eminent for Abilities, if they be not as eminent for Humility and Self-command, their Hearts will soon over-rule their Heads into a Faction. And therefore though the *Earl of Warwick* was a wise man, and the *Duke of Gloucester* a wise man, yet the

Earl

Earl of Warwick with the Duke of Gloucester, were not wise. On the other side, the *Proteſtorſhip* of the King's perſon being in the Duke of *Exeter*, and that of the Realm in the Duke of *Glouceſter*, things ſucceeded paſſing well; for they both had one publick aim, and the Duke of *Exeter* could comply with the Spirit of the Duke of *Glouceſter*, who otherwiſe was not ſo pliant. But after five years, the Duke of *Exeter* dying, and the Government of the King's perſon devolving to the Earl of *Warwick*, who ſided with the proud Cardinal of *Wincheſter* againſt the Duke of *Glouceſter*, and ſo not only conſumed the reſt of the King's *Non-age* in a reſtleſs diſturbance of Affairs, but alſo deſpoiled *Henry* the Sixth of the ſpirit of a King for the future, and ſo the Kingdom of a King. For it was not the condition of *Henry* the Sixth, to be endowed with a ſpirit of ſuch height, but might well have been led by Advice, and needed not the Earl of *Warwick's* rugged Brow to over-look him; who was not content to have the King only attendant upon his Advice, but muſt likewiſe have him under his Rod, to be corrected for his Faults; and that by a Commiſſion under the King's own Hand and Seal, dated in the Eleventh year of the King's Reign: and ſo under colour of curbing, he killed that ſpirit in the King, which otherwiſe doubtleſs had both ſpirit and pride enough to act himſelf above his due height, and could not have been ſo long a *Child*, and ſo little a *Man* as he was.

It is very true, that *Henry* the Fifth by Will, ſeemed to countenance his Brothers; and it cannot be denied but the Duke of *Glouceſter* was of ſuch noble parts, that they could hardly dilate in any work inferiour to the Government of a Kingdom. Nevertheleſs, to yield much to the Will of a deceased King in ſuch caſes, is as ill a precedent, as the making of a King by *Adoption*. And it had been better for the people to have adhered to the Duke of *Glouceſter* alone, than by joining him with another, bring into precedent ſuch a luxuriant Complement of State, as a *Proteſtorſhip of a Kingdom*, which is of ſuch little uſe to a Commonwealth, and of ſo bitter Fruit to the Party, as muſt needs bring Repentance when it is too late. For he that can manage the *Proteſtorſhip of a Realm*, without anger of good men, or envy of bad men, is fitting to live only with Angels, and too good for the World. Nor did the Duke of *Glouceſter* meet with better meaſure, how wiſe ſoever he was, and truly devoted to the good of the Realm. For after four and twenty years Government, ſo wiſely and faithfully carried on by him, that Juſtice it ſelf could not touch his perſon; Unjuſtice did, and he received this reward from his Nephew *Henry* the Sixth, that he died in the dark, becauſe the Cauſe durſt not endure the light.

Now is *Henry* the Sixth perſuaded that he is of full Age, he had laid aſide his Guardian the Duke of *Glouceſter*; but forgetting to ſue out his *Livery*, he betakes himſelf from the Grace of God, into the warm Sun, (as the Proverb is) changing the advice of a faithful experienced wiſe Counſellor, for the Government of an Imperious Woman, his Queen; who allowed him no more of a King, than the very Name; and that alſo ſhe abuſed, to out-face the World. And after ſhe had removed the Duke of *Glouceſter* out of the way, undertook the ſway of the Kingdom in her own perſon, being a Foreigner, neither knowing nor caring for other Law than the *Will of a Woman*.

Thus the Glory of the Houſe of *Lancaſter* goes down, and now a Star of the Houſe of *York* appears in the riſing, and the people look to it. The Queen hereat becomes a Soldier, and begins the *Civil Wars* between the two Houſes, wherein (her *Engliſh* party growing wiſe and weary) ſhe prays Aid of *Ireland*; a Nation that

Comin. lib.
2. cap. 7.

that like unto Crows, ever waits to prey upon the Infirmities of *England*. The Wars continue about sixteen years by fits, wherein the first loss fell to the *English* party, the pretensions being yet only for good Government. Then the Field is quiet for about four years; after which, the clamour of ill Government revives, and together therewith a claim to the Crown by the House of *York* is boldly avouched. Thereupon the Wars grew hot for about four years more; and then an ebb of as long Quiet ensues. The Tide at last returns, and in two years War ends the Quarrel, with the death of fourscore Princes of the Blood-Royal, and of this good Man, but unhappy King.

Comin. lib.
3. cap. 8.

* i. e. Leagues
and Treaties.

Unhappy King, I say, that to purchase his Kingdom's Freedom from a foreign War, sold himself to a *Woman*, and yet lost his Bargain, and left it to Observation, *That a Consciencious Man that marries for by-regards, never thrives*. For *France* espied their advantage; they had maintained War with *England* from the death of *Henry* the fifth, with various success. The Duke of *Bedford* being Regent for the *English*, for the space of fourteen years mightily sustained the fainting condition of the *English* Affairs in those parts; and having crowned his Master *Henry* the Sixth in *Paris*, in the ninth year died; leaving behind him an honourable Witness, even from his Enemies: *That he was a brave Commander, a true Patriot, and a faithful Servant to his Lord and Brother Henry the Fifth, and to his Son Henry the Sixth*. But now the Duke of *Bedford* is dead; and though *France* had concluded a Peace with the *English*, yet they could not forget the smart of their Rod, but concluded their Peace upon a Marriage to be had with a *Woman* of their own blood and interest. And what they could not effect by Arms in their own Field, they did upon *English* ground by a *Feminine* Spirit, which they sent over into *England* to be their Queen; and in one Civil War (shedding more *English* blood by the *English* Sword, than they could formerly do by all the men of *France*) were revenged upon *England* to the full, at the *English-men's* own charge. For what the *English* gain by the Sword, is commonly lost by *French* Discourse *.

A kingdom is never more befooled, than in the Marriage of their King: if the Lady be great, she is good enough, though as *Jezabel*, she will neither reverence her Husband, obey her Lord and King, nor regard his People. And thus was this Kingdom scourged by a Marriage, for the sin of the wise men that (building upon a false Foundation) advised the King in the Breach of Contract with the Earl of *Arminiack's* Daughter. And thus the King also, for that hearkning to such Counsel, murdered the Duke of *Gloucester*, that had been to him a Father; yielded up his Power to his Queen, (a masterless and proud woman, that made him like a broken Idol without use) suffered a Recovery of his Crown and Scepter in the Parliament from his own Issue, to the Line of *York*; then renewing the War (at his Queen's beck) lost what he had left of his Kingdom, Country, and Liberty; and (like the King that forgot the kindness of *Jeboiada*) lost his Life by the hand of his Servant. [Note, a Parallel to this in the Reign of *Ch. I.*]

C H A P. XIV.

Of the Parliament during the Reigns of these Kings.

THE Interest of the Parliament of *England* is never more predominant, than when Kings want *Title* or *Age*. The first of these was the Case of *Henry* the Fourth immediately; but of them all, in relation to the pretended Law of the Crown: but *Henry* the Sixth had the disadvantage of both; whereof in its due place.

The pretended Law of the Crown of *England*, is to hold by Inheritance, with power to dispose of the same, in such manner, by such means, and unto such persons as the King shall please. To this, it cannot be denied, divers Kings had put in their claims, by devising their Crown in their Last Will: but the success must be attributed to some power under God, that must be the Executor when all is done; and which must in cases of Debate concerning Succession, determine the matter by a Law best known to the Judge himself.

Not much unlike hereunto, is the Case of *Henry* the Fourth, who like a Bud putting up in the place of a fading Leaf, dismounts his Predecessor: First, from the people's regard, and after from his Throne; which being empty, sometimes he pretended the resignation of his Predecessor to him, other whiles an obscure Title by descent; his Conscience telling him all the while, that it was the Sword that wrought the work. But when he comes to plead his Title to Foreign Princes by *protestation*, laying aside the mention of them all, he justifies upon the *unanimous consent* of the Parliament, and the People, in his own only person. And so before all the World, confessed the Authority and Power of the Parliament of *England*, in disposing of the Crown in special Cases, as a sufficient Bar unto any pretended Right that might arise from the House of *Mortimar*. And yet because he never walks safely that hath an Enemy pursuing him still within reach, he bethinks himself not sure enough, unless his next Successors follow the dance upon the same foot: To this end an Act of Parliament leads the Tune, whereby the Crown is granted or confirmed to *Henry* the Fourth for life, and entailed upon his Sons, *Thomas*, *John*, and *Humphrey*, by a Petition presented 5 *Hen.* 4.

Thus *Henry* the Fourth, to save his own stake, brought his Posterity into the like capacity with himself, that they must be Kings, or not subsist in the World; if the House of *York* prevails. And so he becomes secured against the House of *York* treading on his heels, unless the Parliament of *England* shall eat their own word. However, for the present the House of *Lancaster* hath the Crown entailed, and the Inheritance is left *in the Clouds*, to be revealed in due time. For though this was the first precedent of this kind, yet was it not the last wherein the Parliament exercised a Power by Grant or Confirmation, to direct the Law and Course of the Crown as they pleased.

The due consideration hereof, will make the things that follow less strange. For the Parliament, according to occasion, as the *Supreme Power* of this Kingdom, exercised Supreme Jurisdiction in order to the safety of the Kingdom, as if no King had been to be found, in issuing forth Writs under the Great Seal; concluding matters without the *Royal Assent*; treating of Peace with Foreign Nations, and

6 H. 6. n. 22 of other matters; and determining their Resolves before discovery made to the
 1 H. 6. n. 2, King of their Counsels; making *Ordinances*, and ruling by them, 3 H. 6. n. 29.
 4 H. 4. n. 21. 2. H. 6. n. 27. 8 H. 6. n. 12. &c. referring matters determinable in Parliament, to
 4 H. 6. n. 15 be determined according to their directions *Auctoritate Parliamenti*, confirming
 Cir. 3 & 4. Peace made by the King; protesting against Peace made without or against their
 H. 5. n. 14. consent; making *Embassadors* with power to engage for the Kingdom; making *Ge-*
 3 H. 6. n. 10. nerals of the Army, *Admirals* at Sea, *Chancellors*, *Barons*, and *Privy Counsellors*,
 1 H. 6. n. 16 and giving them instructions, 8 H. 4. n. 73, and 76. and 31. 5 H. 4. n. 57. 31
 & 4 H. 6. H. 6. n. 21. and binding them to observance upon *Oath*, 11 H. 4. n. 19, 39. or-
 8 Hen. 6. n. 27. dering the *Person* of the King, denying his Power of *Judicature* in Parliament, and
 28 H. 6. n. ordering his *Houshold* and Revenue; besides many other particulars. See *Cotton's*
 51. Records, *per totum*.
 23 H. 6. n. 51, 52.
 17 H. 6. n. 11.

8 Hen. 4. n. 71. Now if such things as these were thus done, not by one Parliament, which
 possibly might be overswayed by Factions, but by the course of a *Series* of Parlia-
 ments, that mightily laboured against Faction, and unworthy ends and aims; that
 man who shall determine the same to be unjust or indiscreet, should himself first
 be determined to be very just, and exceeding wise. Nor was the *Parliament* partial
 in all this; but being in a way of Reformation, it set upon the work of reforming
 it self.

Some that are very zealous in the point of Arbitrary and Absolute Government
 of Kings in this Nation, and in all other, amongst other grounds rest upon this
 one, That an *English* King hath power to call Parliaments, and dissolve them; to
 make and unmake Members as he shall please. I do easily grant *, that Kings
 have many Occasions and Opportunities to beguile their People; yet can they do
 nothing as Kings, but what of right they ought to do. They may call Parliaments,
 but neither as often or seldom as they please, if the Statute-Laws of this Realm might
 take place. Nor if they could, is that power necessarily and absolutely arising from
 Supremacy; seeing it is well known that such power is betruſted by the Superiour
 States in other Nations, to the *Inferiour*, who daily attend on publick Affairs; and
 therefore can discern when the general Conventions are most necessary. As touch-
 ing the dissolving of Parliaments against the wills of the Houses, it is true that
 sad precedents have been of later times in that kind; and so for want of due at-
 tendance, Parliaments have been enforc'd to adjourn, to prevent a worse inconve-
 nience; but these are infirmities better buried in silence, than produced as Argu-
 ments of power; seeing it is evident that Kings themselves were no greater gainers
 thereby, than an angry man is by his passions. It is true also, that Kings may make
 Lords, and Corporations † that may send their Burgeſſes to the Parliament; and thus
 the King may make as many as he will, (as the Pope did with the Bishops in the
 Council of *Trent*;) yet cannot he unmake them when he pleases, nor take the
 Members from the Parliament, without attainder and forfeiture, according to the
 known Law. Neither can all these Instances prove, that the Kings of *England*
 have the sole and supreme power over the Parliament: Nor did the Parliament in
 these times allow of any such Authority, and therefore proceeded for the reform-
 ing of themselves by themselves, in many particulars, as the Statutes do hold forth.

And first in the point of *Elections*, (for an error in that, is like an error in the
 first Concoction, that spoils the whole Nutriment) they ordained, that the Elec-
 tion of Knights shall be at the next County-Court after the Writ delivered to the
 Sheriff.

* See the Ad-
 vestisement
 before the Ti-
 tle Page of
 the Bo. k.

† Though the
 King may
 make Co po-
 rations, yet
 he can't give
 them a Right
 to be repre-
 ſented in Par-
 liament with-
 out the Com-
 mons Assent.

7. H. 4. c. 15.
 23 H. 6. c.
 15.

That in full Court, between the hours of eight and nine in the morning, Proclamation shall be made of the day and place of the Parliament. That the Suiters duly summoned, and others there present, shall then proceed to the Elections; notwithstanding any Prayer or Commandment to the contrary. That the names of the persons elected (whether present or absent they be) shall be returned by indenture between the Sheriff and the Elizors; and that a Clause to that end shall be added to the Writ or Summons.

This was enough to make the Sheriff understand, but not to obey, till a penalty of one hundred pound is by other Laws imposed upon him, and a year's imprisonment without Bail or Mainprise, besides damages for false return in such cases; and the party so unduly returned, fined, and deprived of all the Wages for his service. Thus the manner of Election is reduced; but the persons are more considerable: for hitherto any man of English blood promiscuously had right to give or receive a Vote, although his Residency were over the wide World.

But the Parliament, in the time of Henry the Fifth, reduced these also (whether they were such as did chuse, or were chosen) unto their proper Counties, or else rendered them incapable to vote or serve for any County. And the like Order was made for the Burroughs, That no person must serve for any City or Burrough, nor give vote in Electing such as shall serve for that Town, unless they be both free and residents within that City or Burrough: A Law no less wholesome than seasonable. For the times of Henry the Fourth had taught men to know by experience, That a King that hath Soldiers scattered over the Kingdom, can easily sway the County-courts, and make Parliaments for their own Tooth. Yet this was not enough; for all Elizors, though of the meanest sort, yet are still able to do as much hurt with their Vote, as those of the best sort, both for wisdom and publick mind, can do good by theirs. This made Elections much subject to parties and confusions, and rendered the Parliament much less considerable or respected.

A remedy hereunto is provided, in the minority of Henry the Sixth, viz. That no man should give his Vote in Elections in the County, unless he hath forty shillings yearly in free Lands or Tenements; and this is to be testified upon Oath of the party. And more plainly it is ordered, (within two years after) that each Elizor shall have Frank-Tenement of that value within the same County. And thus the Free-men yielded up their liberty of Election to the Free holders, possibly not knowing what they did; nevertheless, the Parliament well knew what they did: this change was no less good than great.

For first, These times were no times for any great measure of Civility: The Preface of the Statute shews, That the meanest held himself as good a man, as the greatest in the Country; and this tended to Parties, Tumults, and Bloodshed.

Secondly, Where the Multitude prevail, the meaner sort are upon the upper hand; and these (generally ignorant) cannot judge of persons nor times, but being for the most part led by Faction or Affection, rather than by right Understanding, make their Elections; and thereby the general Council of this Nation, less Generous and Noble.

Thirdly, There is no less equity in the change, than policy: For what can be more reasonable, than that those men only should have their Votes in Election of the Common-Council of the Kingdom, whose Estates are chargeable with the publick Taxes

Of the Parliament, during the

Taxes and assessments, and with the *Wages* of those persons that are chosen for the publick Service. But above all the rest, this advancing of the *Free-holders* in this manner of *Election*, was beneficial to the *Freemen* of *England*, although perchance they considered not thereof; and this will more clearly appear, in the consideration of these three particulars.

First, It abated the power of the *Lords* and *Great Men*, who held the inferiour sort at their devotion, and much of what they had by their Vote.

Secondly, It rendred the Body of the *People* more brave; for the advancing of the *Free-holder* above the *Free-man*, raiseth the spirit of the meaner sort to publick regards; and (under a kind of Ambition) to aspire unto the degree of a *Free-holder*, that they may be somewhat in the Commonwealth. And thus leaving the meanest rank sifted to the very bran, they become less considerable, and more subject to the Coercive Power, whilst in the mean time the *Free-holder*, now advanced unto the degree of a *Yeoman*, becomes no less careful to maintain correspondence with the Laws, than he was industrious in the attaining of his degree.

Thirdly, By this means now the Law makes a separation of the inferiour *Clergy* and *Cloistered People*, from this service, wherein they might serve particular ends much, but *Rome* much more. For nothing appeareth, but that these *dead persons* in Law, were nevertheless *Free-men* in Fact, and lost not the liberty of their Birth-right by entring into Religion, to become thereby either *Bond* or no *Free-Members* of the people of *England*.

²³ H. 6. c. ^{15.} *Lastly*, As a binding Plaister above the rest; *First*, a Negative Law is made, that the persons elected in the County, must not be of the degree of a *Yeoman*, but of the most noted *Knights*, *Esquires*, or *Gentlemen* of the County; which tacitly implies, that it was too common to advance those of the meaner sort. Whether by reason of the former wasting times, *Knights* and *Esquires* were grown scant in number, or (by reason of their rudeness) in account; or it may be the *Yeomanry* grew now to feel their strength, and not meant to be further Underlings to the great Men, than they are to their Feathers, to wear them no longer than they will make them brave. *Secondly*, the person thus agreed upon, his Entertainment must be accordingly; and therefore the manner of taxing in full County, and levying the rate of Wages for their maintenance, is reformed and settled. And *Lastly*, their persons are put under the protection of the Law in an especial manner; for as their work is full of reflection, so formerly they had met with many sad influences for their labour. And therefore a penal Law is made, against force to be made upon the persons of those Workmen of State, either in their going to that Service, or attending thereupon; making such Delinquents liable to Fine and Imprisonment, and double Damages. And thus however the times were full of Confusions, yet a foundation was laid of a more uniform Government in future times, than *England* hitherto had seen.

C H A P. XV.

Of the Custos, or Protector Regni.

KINGS, though they have vast Dimensions, yet are not infinite, or greater than the bounds of one Kingdom; wherein if present, they are in all places present; if otherwise, they are like the Sun gone down, and must rule by reflection, as the Moon in the night. In a mixt Commonwealth they are *integral* Members, and therefore regularly must act *per deputatum*, when their persons are absent in another *Legialty*, and cannot act *per se*: Partly because their Lustre is somewhat eclipsed by another Horizon; and partly by common intendment they cannot take notice of things done in their absence. It hath therefore been the ancient course of Kings of this Nation, to constitute *Vice-gerents* in their absence, giving them several titles, and several Powers, according as the necessity of Affairs required. Sometimes they are called *Lord Warden*, or *Lord Keeper* of the Kingdom, and have therewith the general power of a King; as it was with *John Warren* Earl of *Surrey*, appointed thereunto by *Edward* the First, who had not only power to command but to grant; and this power extended both to *England* and *Scotland*.^{Rot. Par. 24 E. 1. m. 4.} And *Peter Gaveston* (though a Foreigner) had the like power given him by *Edward* the Second over *England*, to the reproach of the *English* Nobility; which also they revenged afterward. Sometimes these *Vice-gerents* are called *Lieutenants*; which seemeth to confer only the King's power in the *Militia*, as a *Lieutenant-General* in an Army.^{Rot. Pat. 1. E. 2. m. 2.} And thus *Richard* the Second made *Edmund* Duke of *York* his *Lieutenant* of the Kingdom of *England*, to oppose the entry of the Duke of *Hertford* (afterwards called *Henry* the Fourth) into *England*, during the King's absence in *Ireland*. And in the mean while the other part of the *Royalty* which concerned the Revenues of the Crown, was entrusted to the Earl of *Wiltshire*, Sir *John Busby*, Sir *James Baggot*, and Sir *Henry Green*, unto whom (Men say) *The King* put his Kingdom to farm. But more ordinarily the King's power was delegated unto one, under both the Titles of *Lord Guardian* of the Kingdom, and *Lieutenant* within the same; such was the Title of *Henry Lacy* Earl of *Lincoln*, and of *Gilbert de Clare* Earl of *Gloucester*, and of *Audomar de Valencia* Earl of *Pembroke*; all of them at several times so constituted by *Edward* the Second, as by the Patent-Rolls appeareth.^{Rot. Pat. 4. E. 2. Pat. 1. m. 18.} So likewise did *Edward* the Third make his Brother *John* of *Eltham* twice, and the Black Prince thrice, and *Lionel* Duke of *Clarence*, and his Brother *Thomas*, each of them once, in the several passages of *Edward* the Third beyond the Sea, in the third, fifth, twelfth, fourteenth, sixteenth, nineteenth, and thirty third years of his Reign; concerning which, see the Patent-Rolls for those years. And *Henry* the Fifth gave likewise the same Title and Authority to the Duke of *Bedford*, upon the King's Voyage into *France*; and afterward that Duke being sent over to second the King in the *French* Wars, the Duke of *Gloucester* obtained the same power and place.^{10 Hen. 5. p. m. 9. 7 H. 5. m. 23.} But *Henry* the Sixth added a farther Title of *Protector* and *Defender* of the Kingdom and Church of *England*; this was first given to the Duke of *Bedford*, and afterwards he being made *Regent* of *France*, it was conferred upon the Duke of *Gloucester*: And towards the latter time of *Henry* the Sixth, it was granted by him to *Richard* Duke of *York*. This Title carried along^{1 Hen. 6. p. 2. m. 3. 32. H. 6. m. 7.}

Of the Custos, or Protector Regni,

along with it a power different from that of a King, only in honour; and the person so adorned, may be said to *sway the Scepter*, but not to *wear the Crown*. And therefore in the *minority* of *Henry the Sixth*, whenas the Government was ordered by the Parliament, and to that end a *Protector* was made, and he well guarded with a Privy Council, and they provided with Instructions; one of them was, *That in all matters not to be transacted ordinarily but by the King's express consent, the Privy Council should advise with the Protector*: But this is not so needful, in regard that it concerneth the power of executing of Laws, which by right of the liberty of the Subject, is the known duty of the *Scepter*, in whose hands soever it is holden. And therefore I shall pass to the *Legislative Power*, wherein it is evident that the *Protector's* power was no whit inferiour to the King's power. For *First*, the *Protector, ex Officio*, by advice of the Council, did summon Parliaments by Writs, even as the King's themselves, under their own *Test*; and if they did not bear the *Royal Assent*, yet did they direct the same, and receive Petitions in Parliament to them directed as to Kings, and every way supplied the room of a King, in order to the perfecting, publishing, and enforcing of Law to Execution. *Secondly*, the Parliaments holden by *Protectors*, and Laws therein made, are no whit inferiour to those by the King, whether for Honour or Power. And therefore if a Parliament be holden by the *Lord Warden*, and sitting the Parliament the King in person shall arrive, and be there present, neither is the Parliament interrupted thereby, nor the power thereof changed at all; though the power and place of the *Wardenship* of the Kingdom doth utterly vanish by the personal access of the King: because in all places where the King is subservient to the Kingdom or the Commonwealth, the *Lord Warden* in his absence is conservient unto him, being in his stead, and not under him; for the very place supposeth him as not, because not present.

2 H. 5. c. 1. And this was by a Law declaratively published at such time as *Henry the Fifth* was *Regent* in *France*; and therefore by common presumption, was likely to have much occasion of residence in that Kingdom; and it holdeth in equal force with all other Laws of the highest size: which is the rather to be noted, because it is (though under a *Protector*) obligatory to the King, and makes his personal presence no more considerable than the presence of his shadow: for the King spent three whole years in the *French Wars*, and during that time never saw *England*; where nevertheless, in that interim, three Parliaments had been holden, one by the Duke of *Bedford*, and two by the Duke of *Gloucester*; in the last of which this Law was made. And in truth, if we look upon this Title of the Kingdom's *Guardianship* in its bare Lineaments, without lights and shadows, it will appear little better than a Crown of Feathers, wore only for bravery, and in nothing adding to the real ability of the governing part of this Nation: Neither were the persons of these *Magnificoes* so well deserving, nor did the Nation expect any such matter from them. *Edward the first* was a wise King, and yet in his absence chose *Edward the Second* to hold that place, he being then not above fourteen years of age. Afterwards *Edward the Second's* Queen, and the Lords of her party, were wise enough in their way, and yet they chose *Edward the Third* to be their *Custos Regni*, then not fourteen years old; his Father in the mean time being neither absent from the Kingdom, nor deposed, but only

Rot. Par. 5 E.

3. p. 1. m. 16.

dismissed from acting in the administration of the Government. *Edward the Third* follows the same example; he first makes his Brother *John of Eltham* *Custos*

Custos Regni; and this he did at two several times; once, when he was but Eleven years old; afterwards, when he was about Fourteen. Then he made his Son, the *Black Prince*, upon several occasions, three times *Lord Warden* of the Kingdom; once, he being about Nine years old; and again, when he was Eleven years old; and once when about Fourteen years old. Lastly, *Edward* the Third appointed his Son *Lionel Duke of Clarence* unto this place of *Custos Regni*, whenas he was scarce Eight years old; all which will appear upon the comparing their Ages with the several Rolls of 25 E. 1. and 3, 5, 12, 14, 16 or 26, and 19 E. 3. If therefore the work of a *Custos Regni* be such as may be as well done by the Infants of Kings, as by the wisest Counsellor, or most valiant Man, it is, in my opinion, manifest, that the place is of little other use to this Commonwealth, than to serve as an attire to a comely person, to make it seem more fair because it is in fashion; nor doth it advance the value of a King one grain above what his personal endowments do deserve.

Hitherto of the Title and Power; the next consideration will be, of the original Fountain from whence it is derived; wherein the Precedents are clear and plain, that ordinarily they are the next and immediate Offspring of Kings, if they be present *within the four Seas*, to be by them enabled by Letters-Patent or Commission. But whether present or absent, the Parliament when it sate did ever peruse their Authority; and if it saw need, changed, enlarged, or abridged both it and them. Thus was the Duke of Gloucester made *Lord Warden* in the time of Henry the Fifth, (he being then in France) in the room of the Duke of Bedford. The like also in Henry the Sixth's time, whenas the King was young: for then the Parliament made the Duke of Bedford *Lord Warden*, and added unto that Title the Title of *Protector*. Afterward, at the Duke's going over into France, they committed that service to the Duke of Gloucester (if I forget not the nature of the Roll) during the Duke of Bedford's absence, and with a *Salvo* of his right. Not unlike hereunto was the course that was taken by the Parliament in these sullen later times of Henry the Sixth; whereof more hereafter in the next Paragraph.

Lastly, The limitation of this high Power and Title, is different according to the occasion; for the *Guardianship* of the Kingdom by common intendment, is to endure no longer than the King is absent from the Helm, either by voluntary deserting the work, or employment in Foreign parts, though united they be under the Government of the same King, together with this Nation, such as are these parts of France, Ireland, and Scotland, then under the *English Fee*. This is apparent from the nature of the Statute of Henry the Fifth formerly mentioned: for if there was need to provide by that Statute that the King's arrival and personal presence should not dissolve the Parliament assembled by the authority of the *Custos Regni*, then doth it imply, that the personal presence of the King, by and upon his arrival, had otherwise determined the Parliament, and that Authority whereby it sate. But the Precedents are more clear, all of them generally running in these or the like words, *In absentia Regis*, or *Quamdiu Rex fuerit in partibus transmarinis*. It is also to be granted, that the King's Will is many times subjoined thereunto, as if it were in him to displace them, and place others in his absence: yet do I find no Precedent of any such nature, without the concurrence of the Lords or Parliament; and yet that the Parliament hath ordered such things without his consent. For when Richard the First, passing to the *Holy Land*, had left the Bishop of Ely to execute that place during his absence in remote parts; the Lords

finding the Bishop unfaithful in his Charge, excluded him both from that Place and Kingdom, and made the King's Brother *John, Lord Warden* in his stead.

But in the Case of the *Protectorship*, which supposeth disability in the person of the King, the same by common intendment is to continue during the King's disability; and therefore in the Case of *Henry the Sixth*, it was determined, that the *Protectorship* doth *ipso facto* cease at the King's Coronation; because thereby the King is supposed able to govern: although in later times it hath not so been holden. For Kings have been capable of that Ceremony, as soon as of the Title; and yet commonly are supposed to be under the rule of necessity of *Protectorship*, till they be Fourteen years of age, or (as the Case may be) longer. For although *Henry the Sixth* was once thought ripe when he was eight years old, yet in the issue he proved scarce ripe for the Crown at his two and twentieth year. Nevertheless, the *default of Age* is not the only incapacity of Kings; they have infirmities as other men, yea more dangerous than any other man; which though an unpleasant Tune it be to harp upon, yet it is a Theme that Nations sometimes are enforced to ruminate upon; when God will give them Kings in his Wrath, and give those also over to their own Lusts in his Anger. In such cases therefore this Nation sometimes have fled to the refuge of a Protector; and seldom it is that they can determine for how long. When *Henry the Sixth* was above Thirty years old, *Richard Duke of York* was made *Protector*, and *Defender of the Realm*, and of the *Church*. It was done (if the Record saith true) by the King himself, *Authoritate Parliamenti*. It was further provided by the Parliament, that though this was to continue *quamdiu Regi placuerit*, yet the Duke should hold that place till the King's Son *Edward* should come to years of discretion, and shall declare that he will take that place upon himself.

Rot. Par. 32.
H. 6. m. 7. The ground hereof is said to be, that the King was *gravi infirmitate detentus*; which could not be intended of any bodily distemper: for neither doth any such thing appear by any Author or Record. Nor if such had been, yet had it been an irrational thing in the Parliament to determine the same upon the Prince's Discretion, and acceptance of the Charge upon himself. It seemeth therefore, that it was *gravis infirmitas Animi*, and that this way of the Parliament tended to a tacite sliding him out of the Government of the Kingdom, by a moderate expression of a general incapacity in his person.

The Conclusion of all that hath been said concerning this Title, is double; One, that both the *Custos Regni*, and *Protector*, are not subsistent, but consistent with that of a King, because it supposes a King under incapacity.

Secondly, That they tend to teach the people a necessity of having *one Chief*, although it may, in truth, seem to be but a trick of State; like some pretty carved *Cerberus* in the Roof of a Building, that do seem to bear it up, whenas, in truth, it is the Pillars that support both it and them.

C H A P. XVI.

Concerning the Privy-Council.

Nations do meet with their Exigencies, as well as Persons; and in such condition, resolutions taken up by sudden conceit, are many times more effectual than more mature deliberations; which require more time in composing, are more slow in conclusion, let slip opportunities, and fall short of expectation in the end. Such are the ways of debate in the *Grand Representative* of the Kingdom. Add hereunto, that in putting the Laws in execution, greater discretion is required than can enter into the head of any one man, and greater speed than can stand with debate amongst many. And therefore it is beyond all doubt, that the *Conventicles of Council* are no less necessary in their degree, than the *Assembly of the Estates* of this Nation in their Grand Convention.

Yet with this Caveat, that one Genius may move in both; for otherwise the motions of Government must needs be inconstant, inconsistent, and like that of an Hypocrite, one way abroad, another way at home; neither comfortable to it self, nor confiding to others. And therefore cannot these Privater Councils, by any proportion of Reason, be better constituted, than by the *Representative* it self, that it may be a Creature made in its own Image, one and the same with the Image of the Maker.

This was the wisdom and the practice of these times, more ordinarily than in the former: for the Parliament was no less jealous of the power of Henry the Fourth, than of the infirmities of Henry the Sixth; nor more assured in the aims of any of them all, than themselves were in their own Title to the Crown.

Neither was this sufficient: for the Parliament looked upon themselves as a body that sometimes must retire to rest; and upon the *Privy-Council*, as Watch-men subject to change; and therefore they not only give them instruction, but engage them unto observance. Their instructions were sometimes occasional, but some more general; of which I shall instance only in two, which were to be of everlasting regard. First, *That they should bo'd no pleas before them*, that is to say, at the Council-Table, or at the Privy Council; nor before any of them, unless as Judges in the Chancery, Exchequer, or Benches at *Westminster*; so as whatsoever miscarriages were had by the *Privy Council* in Cases of Judicature in the Star-chamber formerly, are now reduced. The second rule was this, That no dispatches should be made at the Council-Table of any matters there agitated, but by general consent. Unity gives life to Action, carrying therewith both Authority and Power; and, when all is done, must derive its original from without, and in all good ends from above. And therefore, as a Seal to all the rest, it was wisely done by the Parliament to draw the minds of the *Privy Council* together, and to present them jointly before God, by an *Oath*, obliging themselves to a solemn and constant observance of their instructions, and to persevere therein. For the unchangeable God can only stamp a lasting Image upon the mind, and bind the same, that is so subject to change, to an unchangeable Law, whereby the People may be made as happy for continuance, as for Righteousness and Peace.

The *Privy Council* thus settled, dressed, and girt, becomes of high esteem, both for Trust and honourable Employment in great matters.

The *Mint* is the very Liver of the Nation, and was wont to be the chief Care of the Parliament it self in all the dimensions thereof. Now the *Mint* is two ways considered, viz. either in the value of the Metal and Money, or in the Coinage.

The first of these, and things most immediately concurring therewith, the Parliament still retains to its own immediate Survey; such as are the inhibiting of exportation of Gold and Silver, and of melting of Coin into Plate or Bullion; the regulating of the current of Foreign Coin, the reducing of Money, both Foreign and Domestick, imbas'd by Counterfacture, Clipping, Washing, &c. the regulating of Allay of Gold and Silver; the regulating Exchange, and such like: concerning all which, the Reader may please to peruse the Statutes 2 H. 4. cap. 5, 6, 11, 13. 4 H. 4. cap. 16. 3 H. 5. Stat. 1. & 4. cap. 6. & 9. cap. 11. and 2 H. 6. cap. 6.

1 H. 6. c. 1.
9 H. 5. c. 6.

The second Consideration touching the *Mint*, concerned the election and government of the Officers, touching the *Mint* and Exchange, or the places where they shall be holden; which, with some other matters of inferiour nature, were left to the Order of the Privy Council, either with the King, or alone, in case of the King's absence or disability.

A second power given to the *Privy Council*, was in point of *Trade* and Merchandize: Formerly they had somewhat to do therein, but still the Parliament set out their bounds. In *Richard* the Second's time, the people had liberty of *Trade* in some Commodities by way of Exportation, but the *Privy Council* might restrain them upon inconvenience to the publick. Now the same is confirmed; and though it concerned Corn only, yet it was a Precedent that led the way to a much larger power in the *Trade* of the Staple Commodities of this Island, to enlarge or straiten it as they thought meet. And so they became in a fair way to have a principal power over the Revenues and Riches of this Nation. But this lasted not long; for within ten years these Licences of Transportation cost the Merchant so much, as he could make little gains of all his care and pains; and therefore a rule is set to a general allowance of all Transportation of Corn, till the price of Wheat came to a Noble, and Barley at Three shillings, and no longer. This being first made Temporary, was afterwards made Perpetual; and so gave a restraint unto the power of the King and Council. But where no positive restraint was made by any Statute, the King and Council seemed to have the sole power left unto them, to open and shut the passes of *Trade* as they pleased. For whereas the Commodity of *Butter* and *Cheese* was made *Staple*, the King and Council had power to stop the sale thereof; notwithstanding that the Law gave full liberty to the Subjects to bring all their *Staple* Commodities to the *Staple*. Nevertheless, this power in the King is not primitive, but derived from the Parliament; for they had power over the King's Licences and Restraints in such cases, as by the several Statutes do appear.

A third power given to the *Privy Council*, was a power of *Summons* and Process against Delinquents in cases of Riots, Extortions, Oppressions, and grievous Offences. The *Summons* to be by Privy-Seal; the Process, Proclamations; and for Non-appearance, Forfeiture, if the Delinquent be of the degree of a Lord; if of inferiour rank, then a Fine of Outlawry. At the first view, the Statute hath an ill-favoured Aspect, as if it raised up a new Court of Judicature; but

but the time is to be considered with the occasion; for it was made for the securing of the peace in a turbulent time. And besides, the Law carrieth along with it two restrictions, which puts the right of Cognizance in the *Privy Council* to the question.

First, it saveth the Jurisdiction of other Courts, and provideth further, *That no matter determinable by the Law of this Realm, shall be by this Act determined in other form than after the course of the same Law in the King's Court, having determination of the same*: which implieth, that some kinds of Riots and Extortions are of so high a nature, that though determinable in the King's Court, yet are they to be determined before the Lords.

In the next place this Law provideth, *That such Offences as are determinable by the Law of the Realm, that is by Jury, shall still be so tried.*

Secondly, If Conviction be upon Confession, or by Certificate, in case where (by reason of parties and partakings) Inquisition by Jury cannot be had, there the Lords shall immediately determine the same. 13 HE 4. c. 7.

Lastly, If the Certificate be traversed, then the same shall be tried in the King's Bench.

But there is another Restriction that undoeth all in effect in point of right; because what this Law settleth therein, it settleth but for seven years, and leaveth the *Privy Council* to the limits of the Common Law for the future. In the mean time, the *Privy Council* may be thought terrible, and very high, both by this Law, and the greatness of the Lords. Kings Uncles, and Kings Brothers, are Subjects indeed, but of so high a degree, that if a little goodness of nature, or publick spirit shine in them, they soon become the Objects of admiration from the Vulgar, and gain more from them by their vicinity, than the King can do at a distance. For the *Commons of England*, by the fair demeanour of popular great men, are soon won out of their very Clothes; and are never more in danger to part with their Liberties, than when the Heaven is fair above their heads, and the Nobility serve the King, and flatter them. Nevertheless, as I said, the season must be also considered of this power thus by this Law contracted: for what the Lords gained not by their popularity, the * Queen did with her power; who now, * i. e. Henry VIth's Queen. mindful of her contemned beauty, and opposition from the Duke of Gloucester against her Marriage, removes him out of the way, gets the reins of Government into her hand, and like a Woman drives on in full career.

The Duke of York and other Lords, not liking this gallop, endeavour to stop her pace; but are all over-born, the Duke taken prisoner; and doubtless had pledged the Duke of Gloucester, but that the Heir apparent of the House of York steps in to rescue. And new troubles arise in Gascoign; to put an end to which, the Queen's party gains, and takes the Duke of York's word for his good behaviour; gets this Law to pass, expecting hereby, if not a full settlement at home, yet at least a respite to prevent dangers from abroad during the present exigency. And thus upon the whole matter the Lords and *Privy Council* are mounted up by the Commons to their own mischief.

Of the Clergy, and Church-Government, during these times.

IT was no new thing in the World, for Princes of a wounded Title to go to the Church-men for a Plaister; and they are ready enough to sing a *Requiem*, so as they may be the gainers. The Princes therefore of the House of *Lancaster* had offended against common sense, if they had not done the like themselves, being not only guilty in their *Title*, but also by a secret Providence drawn into one interest together with the Church-men to support each other. For *Henry* the Fourth and Archbishop *Arundel* meeting together under one condition of Banishment, become Consorts in sufferings, and Consorts in honour: for Society begotten in trouble is nourished in prosperity, by remembrance of mutual kindnesses in a necessitous estate; which commonly are the more hearty, and more sensible, by how much other contentments are more scant. But the Archbishop had yet a further advantage upon the Heart of *Henry* the Fourth; though he was no man of power, yet he was of great interest; exceedingly beloved of the *English* Clergy, and the more for his Banishment-sake. Now whatsoever he is, or hath, is the King's, and the King is his; the sweet influence of the Archbishop and the Clergy enters into his very Soul; they are his dearly beloved *for the great natural love* (as he says to the World) *they bare to him*: what he could he got, what he got he gave to the Church. Thus the Family of *Lancaster* becoming a mighty support unto the Clergy, *Roman* as it was, they also became as stout maintainers of the crackt Title of that younger House. So was fulfilled the old Prophecy of the Oil given to *Henry* the first Duke of *Lancaster*, wherewith *Henry* the Fourth was anointed, *That Kings anointed with that Oil should be the Champions of the Church*. Now for the more particular clearing of this, we are to consider the Church absolutely, or in relation to the Political Government of the People. Concerning the latter, many things did befall that were of a different piece with the rest, in regard that the Lords for the most part were for the Clergy, and they for themselves; but the *Commons* began to be so well favoured with *Wickliff's* way, that they begin to bid defiance at the Clergy's self-ends and aims: and because they could not reach their Heads, they drive home blows at their Legs.

A Parliament is called; and because the King had heard somewhat, feared that the people were more learned than was meet for his purpose, and that the Parliament shall be too wise; he therefore will have a Parliament wherein the people shall have no more Religion than to believe; nor Learning, than to understand his Sense; nor Wisdom, than to take heed of a Negative Vote. But it befel otherwise: for though it was called the *Lack-learning* Parliament, yet had it skill enough to discern the Clergy's inside, and Resolution enough to enter a second claim against the Clergy's Temporalities; and taught the King a Lesson, *That the least understanding Parliaments are not the best for his purpose*. For though the wisest Parliaments have the strongest sight, and can see further than the King would have them, yet they have also so much wisdom as to look to their own skins, and commonly are not so venturous as to tell all the world what they know, or to act too much

much of that which they do understand. But this Parliament, whether wise or unwise, spake loud of the *Clergy's* superfluous Riches; and the King's Wants are parallel'd therewith; and that the Church-men may well spare enough to maintain fifteen Earls, fifteen hundred Knights, six thousand two hundred Esquires, and one hundred Hospitals more than were in the Kingdom.

This was a strong temptation to a needy and courageous Prince; but the Archbishop was at his Elbow. The King tells the *Commons* that the *Norman* and *French* Cells were in his Predecessor's time seized under this colour, yet the Crown was not the richer thereby; he therefore resolves rather to add to, than diminish any thing from, the maintenance of the *Clergy*.

Thus, as the King said, he did, though he made bold with the Keys of St. Peter; for he could distinguish between his own *Clergy* and the *Roman*. The people are herewith put to silence, yet harbour sad conceits of the *Clergy* against a future time; which like a hidden fire, are not only preserved, but increased by continual occasions; and more principally from the zeal of the *Clergy*, now growing fiery hot against the *Lollards*. For that not only the People, but the Nobles, yea, some of the Royal Blood, were not altogether estranged from this new old way; whether it was sucked from their Grandfather Duke *John*, or from a popular strain, of which that House of *Lancaster* had much experience, I determine not. These were the Dukes of *Bedford* and *Gloucester*. *Bedford* was first at the helm of affairs at home, whilst the King acted the Soldier's part in *France*, as ill-conceited of by the *Clergy*, as they slighted by him. At a Convocation once assembled against the *Lollards*, the Duke sent unto their Assembly his Dwarf, as a great *Lollard*, though he was a little man; and he returned as he went, even as Catholick as any of them all; *Non tam despectus à Clero, quam ipse Clerum despiciens atque eludens*. This, and some other slights, the *Clergy* liked not; they therefore find a way to send him into *France*, to be a reserve to his Brother: And in his room steps forth *Humphry* Duke of *Gloucester*, that was no less cool for the *Roman* way than he. *Henry* the Fifth was not more hearty in *Rome's* behalf: for although he was loth to interrupt his Conquest abroad with contests at home; yet he liked not of advancements from *Rome*; insomuch, as perceiving the Bishop of *Winchester* to aspire to a Cardinal's Hat, he said, *That he would as well lay aside his own Crown, as allow the Bishop to take the Hat*. Nor was he much trusted by the *Clergy*, who were willing he should rather engage in the Wars with *France*, than mind the Proposals of the *Commons* concerning the *Clergy's* Temporalities; which also was renewed in the Parliament in his days. Above all, as the *Lancastrian* House loved to look to its own; so especially in relation to *Rome*, they were the more jealous, by how much it pretended upon them for its favour done to their House. And therefore *Henry* the Fourth, the most obliged of all the rest, looked to the *Provisors* more strictly than his predecessors had; and not only confirmed all the Statutes concerning the same already made, but had also provided against ^{H. 4. c. 8.} *Provisors* of any annual Office, or Profit, or of *Bulls* of Exemption from payment of Tythes, or from Obedience Regular or Ordinary, and made them all punishable ^{H. 4. c. 34.} ^{H. 4. c. 7. 8.} ^{H. 5. c. 4.} within the Statute. And further, made all Licences and Pardons contrary ^{there-}

Of the Clergy, and Church-Government,

thereto (granted by the King) void against the Incumbent; and gave damages to the Incumbent in such vexations: for the former Laws had saved the right of the true Patron both against Pope and King.

And thus the *English* Kings were Servants to the Church of *England* at the charges of *Rome*, whilst the Popedom being now under a wasting and devouring Schism, was unable to help itself; and so continued until the time of *Henry* the Sixth, at which time the Clergy of *England* got itself under the power and shadow of a *Protector*, a kind of Creature made up by a Pope and a King. This was the Bishop of *Winchester*, so great a man, both for Birth, parts of Nature, Riches, Spirit, and Place, as none before him ever had the like: For he was both Cardinal, Legate, and Chancellor of *England*, and had gotten to his aid the Bishop of *Bath* to be Lord Treasurer of *England*. Now comes the matter concerning *Provisors* once more to be revived.

First, More craftily by colloquing with the Nobility, who now had the sway in the King's *Minority*; but they would none. An answer is given by the King, that *he was too young to make alterations in matters of so high concernment*; yet he promised moderation. The Clergy are put to silence herewith, and so continue till the King was six years older; and then, with Money in one hand, and a Petition in the other, they renew their suit, but a more subtile way: For they would not pretend *Rome*, but the *English* Church's Liberties; they would not move against the Statutes of *Præmunire*, but to have them explained; it was not much they complained of, for it was but that one word *Othervbert*, which, say they, the Judges of the Common Law expound too largely, not only against the Jurisdiction of the *Holy See*, but against the Jurisdiction of the *English* Prelacy, which they never intended in the passing those Laws. Their Conclusion therefore is a Prayer, *That the King will please to allow the Jurisdiction of their Ecclesiastical Courts, and that Prohibitions in such Cases may be stopped*. But the King, either perceiving that the Authority of *English* Prelacy was wholly dependant on the See of *Rome*, and acted either under the shadow *Legatine*, or at the best sought an Independant power of their own: Or else the King doubting that the calling of one word of that Statute into question that had continued so long, might endanger the whole Law into uncertainty, declined the matter, saving in the moderation of Prohibitions. Thus the *English* Clergy are put to a retreat from their Reserve at *Rome*: all which they now well saw, yet it was hard to wean them. The Cardinal of *Winchester* was a great man, and loth to lay down his power; but his own Tribe grew weary of him and his power. For the greater some Church-men are, unless they be better than men, the inferiour and better Church-men are worse than men. At length therefore the Cardinal is *Unlegated*, and that power conferred upon the Archbishop of *Canterbury*; a man formerly well approved, but by this very influence from *Rome* rendred suspected. Which he perceiving, protested against the exercise of the Jurisdiction *Legatine* without the King's allowance, and so mannerly crept into the Chair.

The *English* Kings and Clergy having thus attained the right discerning of each other, begin to take up a new way of policy; which was to hold nothing

R 2. c. 5.
antiq. Brit.

nothing of the Popedom, but the Form of Worship and Discipline; but as touching *Jurisdiction*, they held it a high point of Wisdom, either to fetch it nigh at home, or to be silent in the matter; having now found a main difference between the *Pope's Will*, and the *Church-Law*; and therefore as formerly the Convocation and Parliament joined in excluding of Foreigners from Church-livings, under the notion of *Intelligencers to Enemies abroad*: So neither now will they allow any provisions for *English-men*; and upon this ground, the Dean and Chapter of *York* refused to admit the Bishop of *Lincoln* to the See of *York*, although assigned he was thereto by Pope *Martin*, and he the darling of Nations, being by joint consent advanced to the Triple Crown, that had been formerly tripled amongst three Popes, and troubled all *Europe*. And whereas during the *Tripapalty* much money had been levied here in *England*, to serve for the recovery of the Popedom to one of an *English* interest; now by joint consent the same is seized upon and stopped, as fuel from the fire, and spent by *Henry* the Fifth in the recovery of a Kingdom in *France*, that should have been employed in recovery of a Popedom at *Rome*. These things concurred to give a wound to the Popedom, that was never cured to this day.

Holl.

Nevertheless, the *English* Clergy was no loser by all this, but gained in the whole sum. For as it made them more depending on the Crown, so it made the Crown more fast to them, from which they had received more real immunities and power, than the Pope ever did, or was able to give them; and might expect to receive many more. What personal respects these three Kings shewed them, hath been already touched. *Henry* the Sixth added one favour, which made all the rest more considerable. Hitherto they had used to meet in Convocation as upon the interest of *Rome*, and little notice was taken of them; now the Nation owns them, and in some respects their work; and it is granted, *That the Clerks of Convocation called by the King's Writ, and their Menial Servants, shall have such privilege in coming, tarrying, and going, as the Members of the Parliament have*. So as though they be not Members, yet they are as Members, if they assemble by the *King's Writ*, and not only by the power of the *Legate* or *Metropolitan*. The antiquity of this Court is great, yet not so great as hath been supposed; nor is it that Court of the Ordinary called the *Church Gemot*, mentioned in the Laws of *Henry* the First, as not only the works thereof, therein set down, do sufficiently declare; but also it is evident, that in *Henry* the Second's days, the Grand Councils of this Kingdom were jointly mixed both of *Clergy* and *Laity*. Nor could the Clergy shut the *Laity* from their Councils, till about the times of *Richard* the First, or King *John*. From which time forward, the *Laity* were so far from protecting of them, (till these times now in hand) all their care was to keep them from violating the Liberty of the People. That they were many times notwithstanding called together by the *King's Writ* before these times, hath also been cleared by another Pen. That their work at such times was to advise concerning such matters as should be propounded to them by the King in Parliament, their Summons do shew; the particulars whereof, for the most part, concerned supplies of Money from the Church-men. And yet sometimes matters of great moment were debated therein. As in a *Convocation* summoned by *Henry* the Fifth in his ninth year, the preheminance of Pope *Eugenius* above the Council of *Bazil* was debated; and as much

8 H. 6. c. 2.

4 Inst. c. 74.

Mr. Will.
Pryn.

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as

Antiq. Brit.

as they could, they determined the same. The credit of their decisions in former time, I believe, was not much amongst the people; because the men were looked upon with an evil eye. Now that the Parliament seemeth to own them in their way, and to protect them; their determinations are somewhat. The Church-men espy their opportunity, and whilst the benevolent influence of the State is in its first heat, they improve it in this manner. The times were now come about wherein light began to spring forth, conscience to bestir it self, and men to study the Scriptures. This was imputed to the idleness and carelessness of the Clergy, who suffered the minds of young Scholars to luxuriate into Errours of Divinity, for want of putting them on to other Learning, and gave no encouragement to studies of humane Literature, by preferring those that were deserving. The Convocation taking this into consideration, do decree, That no person should exercise any Jurisdiction in any Office, as *Vicar-General, Commissary, or Official*, or otherwise, unless he shall first in the University have taken *Degrees* in the *Civil* or *Canon Law*. A shrewd trick this was to stop the growth of the study of Divinity, and *Wickliff's* way: and to imbellish mens minds with a kind of Learning that may gain them preferment, or at least an opinion of abilities beyond the common strain, and dangerous to be meddled with. Like some Gallants that wear Swords as Badges of Honour, and to bid men beware, because they possibly may strike, though in their own persons they may be very Cowards. And no less mischievously intended was this against the rugged *Common-Law*, a Rule so nigh allied to the Gospel-way, as it favoureth Liberty; and so far estranged from the way of the Civil and Canon-Law, as there is no hope of accommodation till Christ and Anti-Christ have fought the field.

6 Hen. 4. c.
1.

Thus much of the Church of *England*, in relation to the State, now as it is absolutely considered, in regard of the several degrees of persons therein. Although these three Kings were much endeared to the *English* Clergy, yet the difference between the *Laity* and them growing high, the King's principal care is now, to keep an even hand between them both: for he that will back two Horses at once, must keep them even, or put his joints to the adventure. First, *Henry* the Fourth granteth, *That no more shall be paid to Rome for the first-fruits of Archbishops and Bishops, than hath been anciently used.* The occasion hereof was, to prevent the horrible mischief, and damnable custom of Rome; for such are the very words of that Statute, unto which the Clergy gave their Vote, if not the first Vote: and therefore certainly did neither believe, nor honour that infallible Chair as their own Mother; nor did they bear her Yoke, further than their own benefit and reason of State did require. For though the immediate benefit of this Law did descend upon the *Prelacy*, yet it also much concerned the interest both of the honour and benefit of the Nation, that the Clergy should not be at the Pope's pleasure to tax and assess as he thought good.

2 Hen. 5. c.
1.

Secondly, *Henry* the fifth added unto the *Prelacy* some kind of increase both of Honour and Power, viz. to visit *Hospitals* that were not of the King's own foundation, and to reform abuses there: for the Patrons either had no power to punish, or will or care to reform them. And thus upon the point, although they lost a Right, yet they gained ease.

3 Hen. 5. c.
1.

Thirdly, The same King confirmed by a Statute unto Ordinaries, the cognizance of Accounts of *Executors* for their *Testators* Estates; which formerly was granted by the Canon-Law, but they wanted power to execute, and a Right to have

have and receive. In all these the *Clergy* or Prelacy were the immediate gainers. In as many other things the people were made gainers, and yet the *Clergy* were no losers, otherwise than (like the Kite) of that prey which was none of their own.

First, They refused formerly to grant Copies of *Libels*, either thereby to hinder the course of Prohibitions, or to make the Copies the more dear, and Money more cheap with them. *Henry* the Fifth, finding this a grievance to the people, passeth a Law, That all Ordinaries shall grant the Copies of *Libels* at such time as by Law they are grantable.

Secondly, As the *Probate of Wills* had anciently belonged to the Ordinary by the ^{2 H. 5. Stat.} Canon-Law, and formerly also confirmed to them by the Parliament; so it also ^{2. cap. 1.} regulated and settled the Fees for such Service. But the *Clergy* having been ever under the nouriture of their Mother *Rome*, that loved to exceed, they likewise accounted it their liberty to take what they could get. But the nigher they come to engage with Kings in their Government according to Law, the more reformed they grow. Formerly *Edward* the Third had settled their Fees, but they would not hold to the rule. Now the Law is doubled by *Henry* the Fifth, with a penalty of treble damages against Delinquents. Furthermore, the very Priests could not contain their *Pater-Nosters*, *Requiems*, *Masses*, and such Wares they had engrossed, ^{3 H. 5. Stat.} and set thereof what price they pleased. The Market was risen to that height, ^{2. c. 8.} that *Edward* the Third undertook to set a rate upon those Commodities: but that also would not hold long; now *Henry* the Fifth sets them a certain stipend some- ^{2 H. 5. Stat.} what more than *Edward* the Third had done, and yet less than the Priests had for- ^{2. c. 2.} merly.

Lastly, Some Laws were made, wherein the Commonwealth gained and the Church were losers. First, Whereas the Church-men formerly held all holy things proper and peculiar to their own Cognizance, especially such as concerned the *Worship of God*; the Parliament now began to be bold with that, and never asked leave. It had now for a long time, even since the *Saxon* times, been the unhappy condition of this Church of *England* amongst others, to decay continually in Piety and right Devotion; but through the light that now revived, and God's goodness, it in these times came to pass, that the people did entertain some sense of their duty towards God more than formerly, and begin to quarrel the abuses done to the Lord's day in the manner of the keeping thereof. London hath the honour for beginning this Reformation by an Act of their Common Council. The Parliament within seven ^{27 H. 6. c. 5.} years after that engage the whole Kingdom in that service (though therewith also are adjoined other *holy Feasts* then holden) and all *Fairs* and *Markets* are enjoined to cease on that day, under pain of forfeiture of Goods exposed to sale; excepting Victual, and excepting the four Sundays in Harvest. And thus though places had their Consecration allowed by the Parliament, and Immunity from trading in *Fairs* and *Markets* by the space of an hundred and sixty years before this time; yet that time which God by his own Law had reserved to his own self, never came under regard to be allowed till now; and yet not by the motion of the *Clergy*, nor by their furtherance. For by their thrusting in the *Holy-days*, they made them equal with the Lord's day; and in Harvest-time superiour, by preserving them in force, when-as the Lord's days were set aside. So God had somewhat of these men, but the Pope more*. Secondly, As the Church-men lost in the former, so the Prelacy in ^{* i. e. more} this that follows. ^{Holidays.}

The Prelates had long since obtained the Trial of *Bastardy*, and therein could strain

strain themselves so far, as to put the case of Inheritance into danger, where the point otherwise was clear enough. And this grew to that height, that it endangered the disinheriting of the Heirs of the Earl of Kent. It is therefore now provided, that before the Ordinary in such Cases proceeded to Trial, Proclamations shall be made in Chancery, to summon all pretenders of Interests or Titles to come before the Ordinary to make their Allegations; and all Trials of Bastardy otherwise made, shall be void; so as whatever the Canon did, the Parliament would not trust to the Ordinaries Summons, nor allow of their power in any other manner than the Parliament thought meet. One thing more remaineth, wherein the true Church of Christ seemed to lose, and yet gained; and the Clergy, joining with the King, seemed to gain, and yet lost: this was the point of Worship which had long stumbled the minds of the people; and was now grown to that strength, that nothing but an Act of Parliament could keep it under. This opinion concerning Worship was at the first so young, that it was not yet baptized with any proper name, but called, *Opinion contrary to the Church-determinations, or Catholic Faith*. And against this the Clergy now stormed more than ever formerly; because it was grown to such a height, as if it meant to overtop theirs. To this end they procured an Act to pass,

2 H. 4. c. 15. *That all Preachers, Teachers, Writers, School-masters, Favourers, or notoriously defamed persons for the maintenance of such Opinions, shall be (upon conviction before the Ordinary, according to the Canons) imprisoned in the Diocesan's Prison, and Fined according to the Diocesan's discretion.*

If upon Conviction, he shall not abjure, or shall relapse, he shall be delivered unto the Secular Power, and be burned.

And that Preachers without Licence of the Diocesan, shall be restrained.

Concerning which Law, I shall first shew what change in the Laws of this Kingdom was endeavoured, and what was really effected.

42 E. 3. c. 3. First, It is an undeniable ground, *That no Freeman can be put to answer before any Judge, but upon presentment, or other matter of Record foregoing, and by due Process of Law*. And yet it had been ruled, that strong presumption, and complaint of credit after it is entred, is sufficient Record to ground proceedings in this Case, to attach the party to answer. But by this Law a Trial is introduced, that neither resteth upon any peremptory Accusation, or proof of Witnes, but meerly upon Inquisition, upon the Oath and Conscience of the party suspected; which in the latter days hath been called the *Trial upon the Oath ex Officio*. For such was the Trial allowed by the Canon in these times; as appears in the Constitutions of *Otho*, and the Decrees of the Archbishop *Boniface*; by whom it was endeavoured to be obtruded upon the *Laity*, about the times of *Henry the Third*, or *Edward the First*: but even the Clergy then withstood it, as *Lindwood* confesseth. And *Otho* in his very Constitution doth hold this forth by that clause of his, *Non obstante obtenta consuetudine*.

Otho de Jur.
Jur. Calumn.

Lind. de Jure
Juran. 2.

Secondly, This Law doth endeavour to introduce a new Judge, with a power to fine and imprison according to discretion; and a Prison allowed to him as his own peculiar; and yet the Writ *De cautione admittenda* still held its power, to regulate

gulate that discretion as formerly it had done; which by the way may render the power of this Law suspicious.

Thirdly, The Clergy are not content to have the Estates and Liberties of the Bodies of the people at their discretion; but they must also have their Lives. *Although no Freeman's Life could by the Fundamental Laws of this Kingdom come to question, but by the Judgment of his Peers; nor could the Clergy by their own Canons interesse sanguini, viz. They cannot put any man to death:* but by this Law they may send any man to death by a Sentence as sure as death, *Tradatur potestati seculari* *: And such a death, not as the Civil Magistrate is wont to execute, by a speedy parting of the Soul from the Body, by loss of Blood, stop of Breath, or such like; but the Clergy must have Blood, Flesh, Bones, and Life and all, even the edge of non-entity it self, or they are not satisfied: and thus the Writ *De comburendo Hæretico* entred into the World. True it is, that some sparks of this fire are found in former times: and *Bracton* toucheth upon such a Law, in case of a Clerk convict for Apostacy *Primo degradetur, & post per manum Laicalem comburatur*; which was indeed the Canon, and that by his own Confession; for it is grounded upon one, *Secundum quod accidit*, in the Synod at Oxford under Archbishop *Becket*. But that Case concerneth a Clerk, who by his profession hath put himself under the Law of the Canon; and it was only in case of *Apostacy*, himself being turned Jew; and this also done upon a sudden pang of zeal and power of an Archbishop that would know no Peer. Nor do we find any second to this Precedent by the space of two hundred years next ensuing; neither doth the Decree of Archbishop *Peckham*, who was not long after *Becket*, treating about Apostacy in Lay-men, mention any other punishment, than that they are to be reclaimed *per censuras Ecclesiasticas*. Nor yet that of Archbishop *Andel*, amongst the Constitutions at Oxford, not long before this Statute; who treating about the crime of *Heresy*, lays the penalty upon forfeiture of Goods, with a *Præsertim*, as if it were the grand punishment. And *Lindwood* in his Gloss upon that place, setting down the Censures against *Heresy*, *Hodie sunt* (saith he) *damnandi ad mortem*; as if it were otherwise, but as yesterday.

ad comburendum.

Lind. lib. 5. de Apostat.

Lind. lib. 5. de Hæret. fol. 159.

Fourthly, the next endeavour is to bring the cognizance of all, wholly to the Ecclesiastical Court, without further Appeal; for so the words concerning Conviction of *Heresy* are: *Whereupon credence shall be given to the Diocesam of the same place, or his Ordinary in that behalf.*

These changes, I say, were endeavoured to be brought upon the Government of this Kingdom; and yet the Law, for all this, suffered no change, nor did the House of Commons (however the name is thrust into the English Ordinary Print) ever yield unto the passing of the same; but in the Parliament next ensuing, they complained thereof and protested, *they would not be bound by such Laws whereto the House of Commons had not given their consent.* And this dashed the Law quite out of countenance, (although it holds the place still amongst the number;) for within four years after, the Clergy bring in another Bill of the same nature in general, though varying in some particulars; but the same was again rejected.

All the strength therefore of this Law resteth upon the King and House of Lords, engaged by the Clergy, (whom they trusted for their Religion; for Book-learning

Antiq. Brit.
273.

Walsingham.
Ypo. Neutr.
457.

learning was with them of small account) and no less by the King; who knew no better way to give the Clergy content, that gave him so much, as to set the Crown upon his Head; nor to discharge his Royal Word, passed by the Earls of Northumberland and Westmorland in his behalf, unto the Convocation, viz. *That they were sent to declare the King's good-will to the Clergy and Church-Liberties; and that he was resolved to defend all the Liberties of the Church by his Kingly Power, and to punish Hereticks and the Church's Enemies in such manner as the Clergy should think meet; and therefore desired their daily prayers for his own and the Kingdom's safety.* And yet for all this, the people were not of this mind; no small part of the Kingdom being overspread with these opinions.

After Henry the Fourth comes Henry the Fifth, and he also makes another essay; the former opinions, then known only by the general names of *Herefy*, are now baptized by the new name of *Lollardry*, and grown so overspreading, that all the troubles of these times are still imputed to them. It was indeed the Devil's old and common trick, thus to inrage earthly Powers against these men; although he be hereby but an instrument in the hand of the chief Builder, that in laying a sure Foundation, doth as well ram down as raise up; for the malice of these men made the people of God to multiply. Henry the Fifth also published a Law to this same purpose.

2 H. 5. c. 7. *That all persons in place of Government, shall swear to use their diligence to destroy all Heresies and Errors, called Lollardries.*

That all Lollards convicted by the Clergy, (left to the secular Power, according to the Laws of Holy Church) shall forfeit their Lands and Tenements to their Lords: And the King to have the Year and Day, and Waste and all his Goods and Chattels.

If the Lord be the Ordinary, the King shall have all.

No Forfeiture to be, till the Delinquent be dead.

They shall be found by Indictment before the Justices of the Peace.

This Indictment being found, shall be sent to the Ordinary with the Prisoner.

The Indictment shall not be for Evidence, but only for Information.

These are the principal things contained in this Law, which by the manner of the compofure, seemeth to be of an uncertain colour, neither made by the Clergy, nor Laity, but spoiled between them both. The intent thereof seemeth to be principally to draw on the House of Commons to pass the Law, under hope of gain by the forfeitures; for the penalty is like that of Felony, though the crime be not exprefly declared to be Felony. But the intent fell short in event.

For *first*, The nature of the Crime is not defined, nor declared by any Law; and therefore can no man by Indictment be found to be such.

Secondly, No penalty of death hath been by any former, or by this Law, determined upon such as are guilty; for it is not enacted by any Law, that such persons shall be delivered to the Secular Power, &c.

Thirdly, This Statute determining the forfeiture to be not till death; and neither that, nor any other Law of this Kingdom determining death; then is no forfeiture thereby determined.

Fourthly, Though this Law taketh it for granted, that *Herefy* and Errors belong to Ecclesiastical Cognizance, yet the same allows of no further proceedings than Ecclesiastical Censures.

Lastly, By this Law there can be no proceeding, but in case of *Indictment*, (for otherwise without *Record* no forfeiture can be) therefore where no *Indictment* is, there is no forfeiture. In all which regards, it is evident that the *Clergy* could by this Law neither get fat nor blood. And therefore at their Convocation, in the next year following, they took another course, and ordered that three in every Parish should make presentment upon Oath of such persons as are defamed for *Here-ticks*, and the truth so far as they can learn. Which puts me in mind of a Presentment that I have seen by some of *St. Mary Overies* in these times: *Item, We saine, that John Stevens is a man we cannot tell what to make of him; and that he bath Books we know not what they are.* This new course shews plainly, that the former held not force as they intended it: So God blasted the practices of the *Clergy* at this time also; rendering this Law *immaterial* that had the *form*, as the other mis-fed in the *form* and had the *matter*.

Fox Martyrol.
589.

C H A P. XVIII.

Of the Court of Chancery.

IT often befalls in State-affairs, that extraordinary exigences require extraordinary remedies, which having once gotten footing, are not easily laid aside, especially if they be expedient for Prerogative. The *Privy Council* in the Star-chamber pretends default of Common-Law, both in speed and severity, in Cases whereby the State is endangered: The Chancery pretends default by the Common-Law in point of equity and moderation. The people taken with these pretences make that Rod more heavy, which themselves had already complained of. What the Chancery was in times past, hath been already shewed; still it is in the growing and gaining hand.

First, In the *Judicatory Power* it prevailed in relation to the *Exchequer*; exercising a kind of power to survey the proceedings thereof, in cases of Commissioners distrained to account for Commissions executed, or not executed. For it was no easy matter to execute Commissions from the Exchequer in those times of parties; nor were men willing with such unwelcome occasions between Friends and Neighbours; and, it may be, they grew weary of embroiling themselves one against another; and of being Instruments of the violent counter-motions of Princes and Great Men.

Secondly, It gained also upon the *Admiralty*, which by former Laws had Jurisdiction in all cases incident upon the great Sea. But now either through neglect of the *Admiral*, or the evil of the Times, occasioning Piracies to grow epidemical, the ill government upon the Sea became dangerous to the State, trenching upon the Truce made between this and other Nations.

For a remedy whereof, first *Conservators of the Truce* were settled in every Port, who had power committed to them to punish Delinquents against the public Truce, both by *Indictment* at the King's suit; and according to the course of the *Admiralty* by complaint, saving matters of death to the cognizance of the *Admiral*. But this was soon found defective; for Justice done in the dark is many times more

26 H. 6. c. 2. respective, and less respected; and therefore within a few years it is provided, *That Offenders against the King's Truce upon the Sea, or in any of the Ports, shall be proceeded against in the Chancery before the Chancellor*; who hath power given him of calling to his assistance some of the Judges to execute the Statute of 2 H. 5. foregoing, by a handsome contrivance. For that Statute was once and again suspended, for the rigour that was used by the former *Conservators*, who being borderers upon the Sea, for their own sake, spared as few as they could; which had so discouraged the Seamen, that the Kingdom had been almost utterly bereaved of its strength at Sea. Nevertheless, all this while, these Laws were but penal, and not remedial for the parties wronged: and therefore another Law is made to give the Chancellor and Judges power to make restitution and reparation.

31 H. 6. c. 4. *Thirdly, The Chancery gained upon the Ecclesiastical Court.* For whereas by the Canon the Church-men were to be judged by their Superiours, according to Ecclesiastical and Ordinary Jurisdiction; and the iniquity of the times was again returned to that height, that Parents could not enjoy their own Children, but the little ones were allured, stoln away, and detained in Cloisters; nor did the Church-men afford remedy in such cases: A Law was made, that upon Complaint hereof made to the Chancellor, the Provincial should be by him sent for, and punished according to his discretion.

4 H. 4. c. 17. *Lastly, The Chancery encroached upon the Common Law:* For whereas the stir between the two Houses of York and Lancaster began to rise, Men made their dwellings in places of security and strength; Women likewise and other persons flying thither for refuge; especially such of them as had most to lose; these were, contrary to the Law of common honesty, urged to engage their Estates unto the desires of such to whom they had fled for refuge; and sometimes compelled to marry, before they could gain their liberty: It was now provided that all such complaints should be heard and determined by the Chancellor.

31 H. 6. c. 9. *Secondly, As touching the Ministerial Power of the Chancery, this likewise was enlarged, in making of Process to compel appearance in cases of forcible Entries, Murders, Manslaughters, Robberies, Batteries, Assemblies in nature of Insurrections, Riots, and Plunder, committed by Servants upon their Masters goods, before their Masters death, and such-like offences now grown common, and in need of sudden remedy.*

4 H. 4. c. 8. *Thus as the work and power of the Chancery grew, so did the place and person of the Chancellor grow more considerable; raised now from being the King's Secretary (for no better was he in former times) to be the Kingdom's Judge; and of such trust, that although the King might make election of his own Secretary, yet the Parliament would first know and allow him that must be trusted with the power over the Estates of so many of the people: And therefore did in these times both place and dis-*
2 H. 4. c. 11. *place Him as they saw expedient.*

In a word, he is become the Kingdom's Darling, and might be more bold with the Common Law than any of his Peers.

C H A P. XIX.

Of the Courts of Crown-Pleas, and Common Law.

AS the *Chancery* on the one side did swell and increase, so was the *King's-bench* in an ebb: the *Council-Table* in the *Star-Chamber* on the one side, and the *Itinerant-Courts* in the *Country* intercepted, and drew away much to their own shares; making themselves fat, the *King's-bench* lean, and the *Rural Courts* for *Crown-Pleas* almost to starve. The *Crown-Pleas* formerly had been determinable in the *King's-bench*, *Goal-delivery*, *Oyer and Terminer*; and many of them by *Justices of the Peace*, *Coroners*, and *Sheriff*. The *Goal-delivery* was afterwards united to the *Judges of Assize*; and if one of them were a *Clergyman*, then to the other, and chief men of the *County*. This was useful for the *Publick*, but not beneficial for some men; and therefore they laboured for *Commissions*, especially directed to parties that they thought would partake: but these were found soon to be dangerous, soon taken away, and the *Goal-delivery* restored to the *Judges of Assize*, as formerly. The *Commissions of Oyer and Terminer* were sued forth upon extraordinary *Emergencies* and *Offences*, wherein the *State* was much concerned for *speedy Execution*. In former times, both these and *Goal-deliveries* were but rarely had, and then granted unto some that perchance knew more of the *Case*, than before-hand was meet to be known. *Edward the Third* amended this *Error*, and ordered that no *Commissions of Oyer and Terminer* should issue forth, but unto *Commissioners* named by the *Court*, and not by the party^{2 E. 3. c. 2.} complaining. But the *Judges of Assize* are now on the growing hand, both of *Honour*, *Use*, and *Power*; the rather, because their persons are of high repute in the *Benches at Westminster*, which are the *Master-pieces* of *Judicature*, and their *Iters* are constant and ordinary. Nevertheless, the *Judges of Assize*, though they have the *Goal delivery* annexed to them, yet have they not that absolute power of the *King's-bench*; but are still under the rule of their *Commission*, which is not alterable but by *Parliament*; and which by it was altered by way of adding new powers as new crimes arose, that required the eye of the *State* to provide for. And so the *Judges of Assize* by degrees grew to be the ordinary *Administrators* of *Justice* throughout the *Kingdom*, yet holding still forth to them a limited power to hear and determine in some *Cases*; but in others only to enquire, and certify, as in the case of *false Returns* by the *Sheriff of Persons elected for the Parliament*.^{11 H. 4. c. 1.} And also in cases concerning the *Statutes of Labourers*, and *unlawful Games and Pastimes*; in which case the *Certificate* is to be made to the *Chancellor*. And also in cases concerning *Liveries*, contrary to the *Statutes* wherein the^{2 H. 4. c. 21.} *Certificate* is to be made to the *King's-bench*; which power in this last case, continued in that manner by the space of thirty years; and then by another *Statute*^{13 H. 6. c. 3.} they had the power to determine such cases before themselves. In like manner^{8 H. 6. c. 4.} they had power to hear and determine cases of *falsehood*, in counterfeiting and corrupting of *Money*, by washing, clipping, &c. And also defaults committed by *Sheriffs*, *Bailiffs*, and their *Officers*, against the *Statutes of Forcible Entries*, and^{4 H. 5. c. 7.} of wearing of *Liveries*, as aforesaid.^{8 H. 6. c. 9.}

These were signs of much confidence and trust in them; and yet notwithstanding, in these, nor in none of these, were the *Penalties by Fine* left to the *Ar-*

bitry of the Judges; no nor to the Justices of the *King's-bench*, but were by the very Letter of the Law determined. Nor would the Parliament trust these men with doing Justice in the Cases aforesaid, in their own Countries where they dwelled; nor did it think expedient to allow the Chief Justice of the *King's-bench* unto that service in any of them all, but only once in the County of *Lancaster*, and then only at the King's pleasure. Otherwise it was to be as was used by the space of one hundred years foregoing; possibly because his power was too great to be trusted amongst the people.

Lastly, the Judges of *Nisi Prius* were anciently made by *Edward* the First, by whom also the *Affizes* were settled at certain times of the year; and afterwards by the Statute of *York*, the *Nisi Prius*, in smaller Cases, was granted before one Justice of the Bench where the Plea dependeth, and one substantial man of the County; but those of greater concernment were to be had before two Justices of that Bench; or in case they were wanting, then before Justices of the other Bench; or in default of them, before the Chief Baron, if he were a man of Law; and in default of that, before the Judges of *Affize*. Therefore in those days the Justices of the Benches in their *Iters* in the Counties, were divided in their power; some being for *Affizes*, others for *Nisi Prius*; and in some times and cases, some were for both. For in those times of *Edward* the Third, Judges of *Affize* had power to enquire in some matters that concerned the Crown, or to try *Nisi Prius*. Nor were these powers united, till in *Henry* the Sixth's time, Justices of *Nisi Prius* had the power of *Oyer* and *Terminer* annexed to them in all cases of Felony and Treason.

What was formerly provided by *Edward* the Third, and *Richard* the Second, for instruction to these Judges, and to bind them thereto by solemn Oath, I shall not particularly mention, but shall leave the consideration of the Original of the whole Judicature of this Nation, unto the Reader's observation upon the premises.

C H A P. XX.

Concerning Sheriffs.

Henry the Fourth, after a small rest in his Throne, though he always sate loose, sought after the civil Peace, as the corner-stone of his subsistence, and that by way of Justice; which found more acceptance with the Vulgar, than the common Education of the greater number in these times could promise: for the worst of men cannot endure to suffer Injustice, though themselves will do it. Now because where Kings are reputed to be the Fountain and Life of Justice, *Sheriffs* may be reputed to be the Breath thereof; and by their Irregularities do render the Government of the King as loathsome, as unsavoury breath doth the person whose it is: Therefore *Henry* the Fourth chose rather to be a loser in his Farm-rents of the *Sheriff-wicks*, than to occasion the *Sheriffs* to save their bargains by oppression. And to this end he took away the course of farming of *Sheriff-wicks*, and made the *Sheriffs* bare accountants for the Annual profits; and as touching the casual profits, the *Sheriff* discharged himself upon Oath. This was a good security to the King; but yet the People was not herewith satisfied: For though

the *Sheriffs* might not take to *Farm*, yet what they had, they might let to *Farm*; and then wherein are the people the better for these Laws? seeing it is all one for them, to be oppressed by the *Sheriff* immediately, as by the Proxy.

For preventing of this inconvenience, another Law is made, *That the Sheriff* ^{H. 4. c. 5.} shall not let his *Bailiwick* to farm, nor be *Non-resident*; and to this he must bind himself by Oath. So as now the *Sheriff* is double girt, and may be fairly ridden, without danger to the King or People. But men ride Horses for ease and pleasure; and he that must bend his mind always to watch his Horse's motion, will chuse rather to go on foot. And therefore Henry the Fifth renewed the Law of Richard the Second, that *Sheriffs* shall be but for one year; and then not to be chosen again, nor serve for three years next following. This order continued for the space of eight years; within which time, War and Pestilence had consumed so many of the richer sort of people, that a Dispensation is granted, that *Sheriffs* may continue in their places for four years. And it was above twenty years after, ere the Stock was recruited again; after which time the substance of the former Statutes of Edward the Third, Richard the Second, and Henry the Fifth, is revived again; with a penalty upon the Sheriff, his Deputy, or Clerk, that shall execute that place above one year. So the custom of holding that Office ten or twelve years, by occasion of the Dispensation for four years, was laid aside. But the Cure would never be perfect so long as *Sheriffs* held by Inheritance: for it was easy to find new *Deputies*, but not to lay down old Customs; nor could it be lasting, unless the penalties also had been annexed to the particular Crimes. ^{H. 5. c. 4.} ^{H. 5. c. 5.} ^{H. 6. c. 8.}

For a *Sheriff*, before he is a year old, by experience formerly had, becomes too cunning for all these Laws; and therefore Laws are made also against the ordinary corruption of these places; such as are extorting of *Fees*, false making of *Juries*, false returns of *Writs*, &c. and damages in such cases given to the party wronged: and when all is done, he is not trusted with taking of *Indictments*. Thus, with much ado, a *Sheriff* is made a tolerable Officer; and his place by degrees so hedged in, that what was in former times hard to pluck up, is now become hard to set. ^{H. 6. c. 1.} ^{6. cap. 4. 15.} ^{c. p. 5. 18. c.} ^{14. 23. cap.} ^{10.} ^{28 E. 3. c.} ^{ult.}

[*Sed adhuc antiquæ Fraudis quædam vestigia manent.*]

C H A P. XXI.

Of Justices, and Laws concerning the Peace.

THE faint Title of Henry the Fourth to the Crown, made him ever tender of the Civil Peace; without breach whereof, he was sure to be quiet in the Throne. He undertook not this work by any superlative Power from and by himself, but useth the help of the Parliament and Laws; wherein he was industrious; pretending love of Unity amongst his people, which nevertheless he liked not, unless in order to quiet between himself and them. The former way of *Justices* of Peace he followed close, reducing the persons to their ancient qualifications. The most sufficient persons, Inhabitants in the County, worth at least twenty pound yearly, unless they be Lawyers, or such as are *Justices* in Corporations. Nor is the King troubled or trusted with the naming or electing of these men, but the Chancellor, or the King's Council; so as now by Law the King can neither be Justice, nor make Justice *Jure proprio*, but as his interest with the Council [or Parliament] is more or less prevalent: and that power that first gave it to

Of Justices, and Laws concerning the Peace,

the Crown, the same power took it away, or imparted, and placed it elsewhere. But as touching the Work or Power of the Justices themselves, it grew exceedingly; much whereof was only of enquiry, and to make Certificates, as of Heresy, Treason, Falshood of Sheriffs, &c. But more of *Oyer and Terminer*, as in case of Watches, Deceitfulness in Trades; as of making Arrow-heads, gilding of Metal, tanning of Leather, imbasing of Silver, selling of waxen Images and Pictures, &c. For the superstition of these times was such, as these petty Gods were not set at so high a price by the Seller, but a higher price by the Buyer. The Parliament therefore set a truer value of them, viz. *For the Wax, so much as the Wax is worth by weight, and but four pence for the Godhead*: So as it seems the Parliament was not very superstitious in their House, whatever they were at Church. Furthermore, the *Justices of the Peace* had power to punish deceit in Measures, Weights, Forcible Entries, and Detainers. In many of which cases, the penalty being Fine and Imprisonment, became a snare to many of the *Justices*, especially such as were of the greater and higher rank, who having Castles of their own, under colour of *Justice* imprisoned Delinquents in their own Castles, and ransomed them at their own pleasure; which proved a great oppression to the people, and occasioned a Law, that *no Justice should commit any Delinquent to other than the County-Goal, saving Franchises to the Lords*. Those times are happy, when Justice waits not altogether at Court, but grows up in the Fields; and *Justices of Peace*, as the King's Arms upon the Royal Mace, as terrible only to the bad; and not as they are pictured before an Ale-house-door, to invite men to transgress.

The Laws for the preservation of the peace, concern either punishment of Crimes committed, or prevention of them from being committed. There is a succession of crimes, as of Men and Ages; because the Scripture tells us, that *the hearts of all are fashioned alike*; yet it is with generations as with men, some incline to some crimes more than other: and that is the reason that the title *Treason*, sometimes is set forth in Folio, sometimes in a lesser Volume. It is evident in Story, that the violent times of *Richard* the Second had raised the value of that, amongst other offences, above measure: not long before his time, his Father had reduced that wild notion of *Treason* to a certain rule, that formerly wandred in a Wilderness of opinions. But *Henry* the Fourth, either to save his own stake, or to take the people, or both, reduced it again to the Statute-rule of *Edward* the Third, and made void that Statute of his Predecessors; which had made a former Act of Parliament, and all the service thereby done, *Treason*. The Dimensions of *Treason* thus clearly limned and declared, taught ill-disposed minds to keep out of the Letter, and yet to be bold with the Sense: Counterfeit Money they durst not; yet to diminish the same, they thought came not within the Circle: and so it became a common grievance, till a Law was made, *That all purposed impairing of Money should be Treason*. And so the Parliament held forth to all men, that had power to declare *Treason*, without the bounds of the Statute of *Edward* the Third. The like power it held forth in the time of *Henry* the Sixth; for men knew that *Burglary* and *Robbery* were mortal crimes, they would no more of that; now they devise a way to spoil, and prey for themselves, and yet neither to rob, nor break House. To this end they would scatter little Scrolls in writing, requiring the party that they intended to prey upon, to leave so much money upon such a day, at such a place; and this was *sub pena* of burning the parties House and Goods: which

which many times did ensue upon default made. *This practice was at once made Treason to prevent the growth of such an evil.* And the like was done with *Robberies* and *Manlaughters*, contrary to the King's Truce and Safe-conduct.

14 H. 6. c. 8.

As many or more new *Felonies* were also now created.

One was the *cutting out of men's Tongues*, and *plucking out of Eyes*; a strange cruelty! And that shewed the extream savageness of those times; so much the more intollerable, by how much the poor tortured creature could hardly be either Eye or Ear-witness of the truth of his own wrong.

A second *Felony* was, the customary carrying of Wool, or Wool-fells, out of the Realm, to other places; except *Calais*.

Another *Felony* concerneth Soldiers, which I refer over to the next Chapter.

The last was, Servants plundering their Masters Goods, and absenting themselves: if upon Proclamation made, they appear not, this was also made *Felony*.

33 H. 6. c. 1.

In the next place, as touching *Forcible Entries*, and *Riots*, the remedies so often inculcated, and new dressed, shew plainly the nature of the times. These kind of crimes commonly are as the light Skirmishes in the beginning of a War, and follow in the Conclusion also, as the faintings of a Battle fought till both sides be weary.

I shall not enter into each particular Statute, divers of them being little other than as assertions annexed to a Sentence; to add credit, and stir up minding in men, that otherwise would soon forget what is said or done. The remedies formerly propounded, are now refined, and made more effectual.

First, in regard of speed, which is as necessary in these forces, as the stopping of the breaches of Waters in the first act; and therefore one *Justice of the Peace* may proceed upon a *holder by force*, or *breaker* of the Peace, with a *Continuando*: but Riots are looked upon as more dangerous; and the first opposition had need be more stiff, lest being uneffectual, it aggravate the violence; and therefore it is required that two *Justices* and the *Sheriff* should join in the work, to carry on the work with more Authority and Power. And what they cannot do in the *punitive* part, they must certify to the King and his Council, or to the King's Bench, if Traverse be made. So as though the power of the County be annexed to the Sheriff *Jure ordinario* to maintain the Peace, yet the Parliament did delegate the same upon *Justices*, as it thought most expedient.

8 H. 6. c. 9.

31 H. 6. c. 9.

2 H. 5. c. 9.

To maintain and recover the *Peace* when it is broken, shews more Power; but to prevent the breach, shews more Wisdom: and therefore to all the rest, the Wisdom of these Times provideth carefully.

First, For *Guards* and *Watches*, according to the Statute at *Wint.* and committed the care thereof to the *Justices of the Peace*.

5 H. 4. c. 3.

And Secondly, Against the gendring of parties; for it is commonly seen, that such as are admired for excellencies of person, are so far idolized of some, as that their Gestures, Actions, and Opinions are observed: Tokens of favour (though never so small) are desired from such; and the *Idol* likes it well; gives Points, Ribbons, it may be Hats; and with these, men are soon gained to be Servants in the fashion, and not long after to be Servants in Action, be it *War* or *Treason*, or any other

other way. This manner of cheat, the former times had been too well acquainted with; *Knights* and *Esquires* are not to be feared in times where the word *Lord* carries the wonderment away; their offences against the Statutes of *Liveries* are all great, though in themselves never so small; and therefore are sure of *Fine*, and *Ransom*; and it is well if they escape a year's imprisonment without *Bail* or *Main-prize*. *Lords* may wear the *King's Livery*, but may give none. *Knights* and *Esquires* may wear the *King's Livery* in their attendance upon his person, but not in the Country. The King and Prince may give *Liveries* to *Lords*, and menial Servants. The sum is, that *Liveries* may be given by the more publick persons, for state, not to make parties; and men may wear *Liveries* in token of Service in Peace, and not in Arms.

One thing must be added to all, which may concern Trial in all, viz. A law was made, that *Noble Ladies* shall be tried by their *Peers*. A Law now of the first stamp; and strange it is, that it never came before now into the breast of the Law; but that it came now, it is not strange. No meaner person than the *Duchess of Gloucester* is first charged with *Treason*; when that could not appear, then for *Necromancy*; very fitly, that she might be tried by the Ecclesiastical way of *Witnesses*. She is found guilty, and a Sentence of Penance, and Imprisonment, or Banishment passed thereupon; after such a wild way, as both Nobles and Commons passed this Law, for the vindication of that noble Sex from such hudling Trials for the future.

C H A P. XXII.

Of the Militia during these Times.

THE Title of *Henry the Fourth* to the Crown, was maintained principally by his *Tenures*, which the Courtiers call *Knight-service*; but the Common People, *Force of Arms*: And that which destroyed many a man, was the principal means of his subsistence. Otherwise it is clear, that his Title was stark naught; nor could he out-face *Mortimer's* Title, without a naked Sword, which he used warily: for he had Enemies enough to keep his Sword in hand; and Friends enough to keep it from striking at random. For coming in by the people's favour, he was obliged to be rather remiss than rigorous: yet his manner of coming was by the Sword, and that occasioneth men much to debate about his absolute power in the *Militia*, as supposing that what power he had, other Kings may *de jure* challenge the same. And let that be taken for granted, though it will not necessarily follow in true reasoning: And let it also be taken for good, That *Henry the Fourth* entred the Throne by his Sword; yet is there not any Monument in Story or Antiquity, that favoureth any absolute right in him over the *Militia*; but the current is, I think, somewhat clear against it.

First, Because *Henry the Fourth* *de jure* could not compel men to serve beyond the Seas, but raised them by contract; and therefore by Act of Parliament, he did confirm the Statute 1 *Edw. 3. Stat. 2. cap. 5.* which Statute was purposely made to that end. And the same also is countenanced by another Statute made in these times,

times, whereof we now treat; by the words whereof appeareth, that the Soldiers^{18 H. 6. c.} for the foreign Service were levied by Contract between them and the Captain,^{19.} who undertook to levy them by Wages; so as none were then compelled to enter into Service by *Imprest*, or absolute Command. Nor is there any Authority amongst all those cited in *Calvin's Case*, that doth mention any such thing; but contrarily,^{7 H. 4. Fitz-herb. Protest. 100.} that Opinion of *Thirning* is expresse, *That the King cannot send men beyond Seas to Wars without Wages*; and therefore no man is bound to any such service, by any *absolute Legiance*, as the Reporter would understand the point: but if he receiveth *Wages* thereto, he by that contract binds himself.

Secondly, It seemeth also to be granted, that such as went voluntarily in the King's Service, ever had the King's Pay, after they were out of their Counties, if the King ruled by his Laws. For by the Statute formerly mentioned, the King did likewise confirm the Statute of 18 *Edw. 3. Stat. 2. cap. 7.* which is expresse in that point; and the matter in-fact also is evident upon the Records.

Thirdly, Touching the arming of those that were thus levied, as there was a certain Law, by which all men were assessed to certain Arms, either by the Service and Tenure of their Lands, or by Parliament; for such as were not bound to find sufficient Arms by their Tenure, according as is contained in the Statute 25 *Edw. 3. Stat. 5. cap. 8.* So did *Henry the Fourth*, by the Statute formerly men-^{4 H. 4.} tioned to be made in his time, confirm that Law of *Edward the Third*. In the argument of *Calvin's Case* it is much insisted upon, to prove the *Legiance* of an *English-man* to the King, to be *absolute*, because he hath power to send men to War at his pleasure; and he hath the only power to make War; and if so, then hath he *absolute power in the Militia*. As touching the power of sending men to War, it hath been already spoken; but as touching the power to make War, there is no doubt, but where a King hath made a *League* with another King, he only can break that^{19 E. 3. f. 6.} *League*, and so make War; and that Opinion of *Brian* must be agreed for good in that sense. But if a *League* be made by Act of Parliament, or if the King will have War, and the Parliament will make a *League* without him; no Authority doth in such case avouch, that it is the right of the King, or that he hath a legal power to break that *League* as he pleaseth. Neither, in the next place, hath the King any Right or legal Power to make War with his own Subjects as he pleaseth, but is bound to maintain the Peace, not only by his Oath at his Coronation, but also by the Laws whereto he is bound, if he will reign in right of an *English King*. For every man knoweth that the grounds of the Statutes of wearing of *Liveries*, was for the maintaining of the publick Peace. And *Henry the Fourth*, amongst other provisions made against that trick, hath this; *That the King shall give only his Honour-^{1 H. 4. c. 7.} able Livery to his Lords Temporal whom shall please him, and to his Knights and Esquires menial, and to his Knights and Esquires which be of his retinue, and take of him their yearly Fee for term of Life; and that no Yeoman shall take or wear any Livery of the King, nor of none other Lord.* And another Law was made within one year^{2 H. 4. c. 21.} ensuing, confirming the former, and providing that the Prince may give *Liveries* to such Lords as he pleases, and to his menial Gentlemen; and that they may wear the same, as in the King's Case. By both which, the King and Prince are both in one Case, as touching the power of giving *Liveries*; if the one hath absolute power, then hath the other the like; if one be under the Directory of Law in that point, then

then is also the other: For it is clear, that the King is intended by the Statute to be bound from giving *Liveries*, and the People from wearing them, otherwise than in especial Cases. And then the conclusion will be, that if the King may not give *Liveries* to the prejudice of the Peace, then may he much less break the Peace at his pleasure; or levy Men, Arms, and War, when he shall think most meet. Take then away from the King absolute power to compel men to take up Arms otherwise than in case of Foreign Invasion, power to compel men to go out of their Countries to War, power to charge men for maintenance of the Wars, power to make them find Arms at his pleasure, and lastly, power to break the Peace, or do aught that may tend thereto, and certainly the power of the Militia that remaineth, though never so surely settled in the King's hand, can never bite this Nation.

Nor can the noise of the *Commission of Array* entitle the King unto any such vast power as is pretended. For though it be granted, that the *Commission of Array* was amended by the Parliament in these times; and secondly, that being so amended, it was to serve for a Precedent or Rule for the future: yet will it not follow, that Henry the Fourth had, or any Successor of his hath any power of *Array* originally from themselves, absolutely in themselves, or determinatively to such ends as he, or they, shall think meet.

First, As touching the amendment of the *Commission*, it was done upon complaint made by the Commons as a grievance, that such *Commissions* had issued forth, as had been grievous, hurtful, and dangerous: And the King agrees to the amendments, upon advice had with the Lords, and Judges. And if it be true that the amendments were in the material clauses (as it is granted) then it seemeth that formerly a greater power was exercised than by Law ought to have been; and then hath not the King an absolute power of *Array*: for the just power of a King can be no grievance to the Subject.

Secondly, If the *Commission of Array* thus mended, was to serve as a rule of *Array* for the future; then there is a rule, beyond which, Henry the Fourth, and his Successors, may not go; and then it will also follow, that the power of *Array* is not originally, nor absolutely, in the King; but from, and under the Rule and Law of the Parliament: which rule was not made by the King's own directions, but (as we are told) beyond expectation, alterations were made in material parts of the *Commission*, and the powers in execution there, whereof no complaint of grievance had been made. The issue then is; If the King had an Universal Power in the *Array*, the Parliament likewise had a general liberty, without any restriction to correct that power.

Lastly, Suppose that this power of the Parliament is executed, and concluded, by the *Commission* thus amended, and that thereby the King's power is established; yet can it not be concluded, that this power is originally or absolutely in the King. It is not *absolutely* in him, because it is limited in these particulars.

(First.) It is not continual, because it is only in case of imminent danger.

(Secondly) It is not general upon all occasions, but only in cases of a foreign and sudden Invasion and Attempts.

(Thirdly.) The powers are not undefined, but circumscribed. I. To *Array*

Array such as are armed, so as they cannot affeſs Arms upon ſuch. 2. To compel Collect. 4. 24. *thoſe of able Bodies and Eſtates to be armed; and thoſe of able Eſtates, and not able Bodies, to arm ſuch as are of able Bodies and not Eſtates: but this muſt be juxta Facultates, and ſalvo Statu. 3. Whereas they ſtrain themſelves to make the Statute of Henry the Fourth, and the Commiſſion of Array, to conſiſt with the Statutes of 13 E. 1. 1 E. 3. and 25 E. 3. thereby they affirm ſo many more reſtrictions unto his power of Array, as thoſe Statutes are remedial in particular caſes: yet do I not agree to their Gloſſes, but leave them to the debate already publiſhed concerning the ſame.*

Secondly, As this power was not abſolutely in the Kings, ſo was it not originally from themſelves, becauſe they had not the Legislative Power concerning the ſame; but the ſame was ever, and yet is, in the Parliament. Hereof I ſhall note only three particular inſtances.

Fiſt, The Militia is a poſture that extendeth as well to Sea as Land: That which concerneth the Sea, is the Law of *Marque* and *Reprizal*, granted to ſuch of the people of this Nation as are pillaged by Sea, by ſuch as have the King's Conduſt, or publick Truce. And by this Law the party pillaged had power to ^{4 H. 5. c. 7.} recompence himſelf upon that man that had pillaged him, or upon any other Subject of that Nation, in caſe upon requeſt made of the Magiſtrate in that Nation, ſatisfaction be not given him for his wrong: it was a Law made by the Parliament, whereby the Chancellor had power to grant ſuch Letters or Commiſſion upon complaint to him made.

This was grounded upon the Statute of *Magna Charta*, concerning *Free Trade*, ^{Mag. Charta. c. 32.} which had been prejudiced by the rigour of the *Conſervators of the Truce*, againſt the King's Subjects, although what was by them done was done in their own defence. And by which means the Foreigners were become bold to tranſgreſs, and the *English* fearful in their own Charge; and many laid aſide their Trade by Sea, and thereby the ſtrength of the Kingdom was much impaired. Nor is the equity of this Law to be queſtioned; for if the Magiſtrate upon complaint made grants not relief, the offence becomes publick, and the Nation chargeable in nature of an Acceſſory after the Fact, and ſo the next man liable to give ſatisfaction, and to ſeek for relief at home.

The King then hath a power to grant Letters of *Marque* by Sea or Land, and this power is granted by Parliament; and this power is a limited power only in particular caſes, in regard that many times theſe prove in nature of the firſt light ſkirmiſhes of a general War.

Two other inſtances yet remain concerning the Order and Government of the Soldiers in the Army; the one concerning the Soldiers pay, *viz. That Captains* ^{18 H. 6. c. 13.} *ſhall not abate the Soldiers Wages, but for their Clothing, under peril of Fine to the King.* The other concerning the Soldiers ſervice, *That they ſhall not depart from their Colours without leave, before the time of their ſervice be expired, unleſs in caſe of* ^{cap. 19.} *ſickneſs, or other good cauſe teſtified and allowed by the Captain; and ſuch as ſhall do otherwiſe, ſhall ſuffer as Felons.* Which Laws could not have holden in force, had they not been made by Parliament, in reſpect that the penalties concern the Eſtates and Lives of men, which are not to be invaded but by the Law of the Land. So as both Captains and Soldiers, as touching the Legislative Power, are not under the King in his *personal capacity*, but under the Law of the Parliament.

Lastly, As the rule of War was under the Legislative Power of the Parliament, so was the rule of Peace: for whilst *Henry* the Sixth was in *France*, which was in his Tenth year, from *St. George's* day till *February* following; the *Scots* propound terms of Peace to the Duke of *Gloucester*, he being then *Custos Regni*; which he referred to the Order of the Parliament, by whom it was determined, and the Peace concluded, in the absence of the King: and was holden, as good and effectual by both Kingdoms, as if the King had been personally present in his full capacity.

C H A P. XXIII.

A Survey of the Reigns of Edward the Fourth, Edward the Fifth, and Richard the Third.

THE Reign of *Henry* the Sixth was for the most part, in the former parts of it, like Fire buried up in the Ashes; and in the latter parts, breaking out into a Flame: In the heat whereof, the Duke of *York*, after Fealty given by him to *Henry* the Sixth, and Dispensation gotten from the Pope to break his Faith, lost his life; and left his Son the *Markgrave* to pursue his Title to the Crown; which he claimed by Inheritance, but more especially by Act of Parliament made upon the agreement between *Henry* the Sixth and his Father. This was *Edward* the Fourth, who nevertheless reserved himself to the Election of the Lords, and was by them received, and commended to the Commons in the Field*. By which means he gaining the possession, had also encouragement to maintain the same; yet never held himself a King of full Age, so long as *Henry* the Sixth lived, which was the one half of his Reign. Nor did he, though he held many Parliaments, scarce reach higher than at reforming of Trade; which was a Theme well pleasing to the people, next unto their Peace, which also the King carefully regarded. For although he had been a Soldier of good experience, and therewith successful, yet as one loth to trust too far, either the constancy of the people of his own Opinion, or the fortune of War with his neighbouring Princes, he did much by brave countenance and discourse: and yet gained repute to the *English* for valour, after the dishonourable times of *Henry* the Sixth. He had much to do with a wise King of *France*, that knew how to lay out three or four calm words at any time, to save the adventure of his people's Blood; and make a shew of money, to purchase the peaceable holding of that which was his only by force, until the wind proved more fair to bring all that continent under one head.

* By a Military Election.

In his Government at home, he met with many cross Gales occasioned principally by his own rashness, and neglect of the Earl of *Warwick's* approved friendship, which he had turned into professed enmity; and so weakned his own cause thereby, that he was once under water, his Kingdom disposed of by a new intail upon the Heirs of Duke *Clarence*; and so the Earl of *Warwick* remained constant to the House of *York*, though this particular King was set aside. Nor did he in all this gain any thing but a Wife, who though his Subject, and none of the greatest Family, neither brought any interest unto her Lord and Husband amongst Foreign Princes, brought nevertheless a Pearl, which was beyond all; which was, the purchase

Com. lib. 3.
c. 4. & 5. & 6.

purchase of the Union between the two Houses of *York* and *Lancaster*, and a peaceable succession in the Throne for a long while to come. It must be granted, that there fell therewith an unhappy inconvenience in the raising of a new Nobility of the Queen's Kindred, of whom the ancient Stock of Nobility thought scorn; and yet they were so considerable as to be envied. A Wound hard to be cured, and yet easily avoided by such as know how to deny themselves: And therefore can be no prejudice unto that conclusion, *That for an English King to marry his own Subject, is more safe for the King, and beneficial for the Kingdom, than to marry a Stranger.*

But *Edward* the Fourth did not long lie underneath; upon the next fair Gale, he comes from beyond the Sea, and (like his first Predecessor of the House of *Lancaster*) claims only his Dutchy; which no man could in reason deny to be his right, and therefore were the sooner engaged with him in that account. This was an act that in the first undertaking seemed modest; but when it was done, appeared too bold to adventure it upon the Censure of *Henry* the Sixth; and therefore they were not more ready to engage, than slack to dis-engage, till they were secure in the King's Interest; which not long after ensued, by the death of *Henry* the Sixth. Thus *Edward* the Fourth recovered the Crown, to save his Dutchy. His Government was not suitable: for he came in by the People, but endeavoured to uphold himself by Foreign Dependencies; as if he desired to spread his Roots rather wide than deep. How ill this Choice was, the event shewed: for Plants that root wide, may be strong enough against an outward Storm; but they soon grow old, barren, and rot irrecoverably from beneath. Such was the end of this Man's Government; himself lived and died a King, and left Issue both Male and Female; the one tasted the Government, the other kissed it; but neither of them ever enjoyed further than a bare Title. Nor was the Government of *Edward* the Fourth so secured by the Engagements of Foreigners: for as he sought to delude, so he was deluded, both by *Burgundy* and *Scotland*, to the prejudice of all three. Comin. lib. 3. Towards his own people his carriage was not so much by Law, as by Leave: for c. 4. he could fetch a course out of the old way of rule, satisfy himself, dissatisfy others, and yet never was called to account. What was done by Entreaty, no Man could blame; and where Entreaties are countenanced by Power, no Man durst contradict. Thanks to his Fate, that had brought him upon a People tired by Wars, scared by his success, and loth to adventure much for the House of *Lancaster*, in which no courage was left to adventure for itself. The greatest error of his way, was in the matter of *Revenue*; the former times had been unhappy in respect of good Husbandry; and *Edward* the Fourth was no man to gather heaps. His occasions conduced rather to diffuse, and his mind generally led the way thereto; so as Comin. lib. 3. c. 5. it is the less wonder if he called more for accommodations, than the ordinary Treasury of the Crown could supply. Hereto therefore he used expedients, which in his former times were more moderate: for whilst *Henry* the Sixth lived, he did but borrow by *Privy Seal*, and take Tonnage and Poundage by way of hire. 12 E. 4. c. 2. Afterwards, when no Star appeared (but what was enlightened from his own Sun) he was more plain, and tried a new trick, called *Benevolence*. Unwelcome it was, not only in regard of its own nature, but much more in the end: for it was to serve the Duke of *Burgundy* in raising a War against *France* in the first view, but Comin. lib. 4. in c. 1.

in the conclusion to serve his own Purse, both from Friends and Foes. And yet this also passed without much controul; for when displeasure was like to ensue, he could speak fair, and feast, and, if need was, kiss away all discontent. Towards his end, as stale drink, he grew sour: For as in the first part of his Reign he had been supplied by good-will against Law; so in his latter times, he had gotten a trick of supply by Law against good-will. This was by *penal Laws*, which are a remedy if they be used *ad terrorem*; but if strained beyond that, the Remedy proveth worse than the Disease. In their first institution, they are forms of courtesy from the people to the King; but in the rigorous execution of them, are trials of mastery of the King over the People, and are usually laid up against days of reckoning between the Prince and them.

Those *penal Laws* are best contrived, that with the greatest terror to the Delinquent, bring the least profit to the King's Coffers. Once for all, this King's Acts were many, his Enterprizes more, but seldom attaining that end which they faced. He was a man of War, and did more by his Fame than his Sword; was no sooner resolved in good earnest, but he died, left a Kingdom unassured, his Children young, and many friends in shew, but in truth very few.

Edw. 5. and
Rich. 3.

Now, if ever, was the Kingdom in a Trance. *Edward* the Fourth left a Son, the *Prima materia* of a King, and who lived long enough to be enrolled amongst *English* Kings, yet served the place no further than to be an occasion to fill up the measure of the wickedness of the Duke of *Gloucester*, and a monument of God's displeasure against the House of *Edward* the Fourth; whether for that breach of Oath, or treachery against *Henry* the Sixth, or for what other cause, I cannot tell. But at the best, this Prince was, in relation to his Uncle the Duke of *Gloucester*, little other than as an *Overseer* to an *Executor*, that might see and complain, but cannot amend. For the Duke ruled, over-ruled and mis-ruled all, under the name of *Edward* the Fifth; and left no monument of good Government upon record, till he changed both the Name and Person of *Edward* the Fifth to *Richard* the Third: his Fame had lifted him up, and might have supported him, had he regarded it. But as no man had more honour before he ascended the Throne, so no man ever entred and sate thereon with less. His proceedings were from a *Protector* to an *Usurper*, and thence to a *Tyrant*; a Scourge to the whole Nation, especially the Nobility; and lastly, an instrument of God's Revenge upon himself, a man made up of Clay and Blood, living not loved, and dying unlamented. The manner of his Government was strained; having once won the Saddle, he is loth to be cast: knowing himself guilty all over, and that nothing could absolve his Fame but a Parliament; he calls it, courts it, and where his Wit could not reach to apologize, he makes whole by recompence; takes away *Benevolences*; he is ready to let them have their present desires, what can they have more? He promiseth good behaviour for the future; which he might the better do, because he had already attained his ends. Thus in one Parliament (for he could hold no more) he gave such content, as, even to wonderment, he could as soon find an Army in the field to fight for him, as the most meritorious of his Predecessors. His ill Title made him very jealous, and thereby taught his best Friends to keep at a distance; after which time few escaped that came within his reach;

Morant. de
Gallar. Imper.
lib. 3.

1 R. 3. c. 2.

reach; and so he served God's Judgment against his adjutants, though he understood it not: Amongst the rest, against the Duke of *Buckingham* his great Associate, both in the Butchery of the two young Princes, and Usurpation of the Royal Sceptre. He lived till he had laid the Foundation of better times in the person of *Henry* the Seventh, and then received his reward. But an ill Conscience must be continually fed, or it will eat up its own womb.

The King's mind being delivered from fear of the Sons of *Edward* the Fourth, now dead, torments himself with thoughts of his Daughter alive: ashamed he is of Butchery of a Girl; he chuseth a conceit of Bastardizing the Children of *Elizabeth Gray*, that calleth herself Queen of *England*; but this proved too hard to concoct. Soon after that, he goes a contrary way. The Lady *Elizabeth Gray* is now undoubted Wife of *Edward* the Fourth, and her eldest Daughter as undoubted Heir to the Crown. And so the King will now be contented to adventure himself into an incestuous Marriage with her, if his own Queen were not in the way, only to secure the Peace of the Kingdom; which he, good King, was bound in Conscience to maintain, though with the peril of his own Soul; and in this Zeal of Conscience, his Queen soon went [or was sent] out of the way, and so Love is made to the young Lady. But *Henry* Earl of *Richmond* was there before; and the Lady warily declined the choice, till the golden Apple was won, which was not long after accomplished; the King losing both the Lady, his Crown, and his own Life together, put an end to much wickedness, and had the end thereof in *Bosworth-Field*. R. 3. c. 15.

C H A P. XXIV.

Of the Government in relation to the Parliament.

THE Seasons now in tract were of short continuance; Lives passed away more speedily than Years; and it may seem useless to enquire what is the nature of the Government in such a time, whenas the greatest work was to maintain Life and Soul together; and when all is done, little else is done. For though the Title of the House of *York* was never so clear against that of *Lancaster*; yet it had been so long darkned with a continual Succession of Kings of the *Red Rose*, who either by their Merit had gained a Throne in the people's Hearts, or by their Facility had yielded their Throne up to the people's Will, as it proved not easy to convince them that liked well their present Lot, and were doubtful of change; or to make them tender of the Right of *Edward* the Fourth above their own quiet. Above threescore years now had *England* made trial of the Government of the *Lancastrian* Princes, and thereof about Thirty years experience had they of *Henry* the Sixth; they saw he was a gentle Prince. On the other side, *Edward* the Fourth, newly sprung up out of a Root watered with blood, himself also a man for the Field.

This might well put the minds of the People to a stand, what to think of this Man, whose Nature and Ends are so doubtful, and brought nothing to commend him to the good wills of the People, but his bare Title; which the common sort usually judge of according as they see it prosper more or less. Add hereunto, that
Divine

Divine Providence did not so clearly, nor suddenly, determine his secret purpose concerning this change, by any constant success to either part; by means whereof, the one half of *Edward* the Fourth's Reign was spent while as yet *Henry* the Sixth was in view, and the minds of men left unassured, neither trusting much to *Edward* the Fourth, nor he to them. And after that *Henry* the Sixth was gone out of the way, *Edward* the Fourth could not readily change his posture; used Arguments of Force and Power, and for the most part, looked like a man in Arms, with his hand on his Sword, ready to draw upon the next man that stands in his way.

¶ E. 4. n. 30.

Thus are the people partly driven, and partly drawn, into an Oath of Allegiance unto *Edward* the Fourth, under peril of Attainder; and the Parliament assured unto him once more. For immediately upon the departure of *Edward* the Fourth beyond Sea, after Ten years of his Reign, the Parliament (never staying for the issue of Providence) declared the Throne void of *Edward* the Fourth, and *Henry* the Sixth King. The Judges likewise of the Courts of *Westminster* determined the same thing, as may appear by the Law-Reports of those times in Print: wherein re-attachments were often granted by them upon discontinuance of Process by this Demise of *Edward* the Fourth. And thus *Henry* the Sixth is once more King for six Months, viz. from *October* to *April*, at which time the Ballance turns; *Edward* the Fourth returns, gets into the Throne; *Henry* the Sixth is again dethroned; all things are as they were, and all confirmed by Act of Parliament. For that Body is ever wise enough to side with power, rather than to spend much time upon fruitless Orders and Votes that will pierce no Armour; and therefore, like the times, must needs be subject to fits of distemper at the coming in of every Tide; and did build and pull down, enact and dis enact, turn and return the *English* Crown from *York* to *Lancaster*, and back again; and in conclusion, for some time did do little but undo. Nor can they be justly censured herein; for Councils of men are not ordained to hinder divine Providence, or over-rule Fate; but to foresee, and close with Occasions, in the most advantageous way for the publick good; and when both Winds and Currents are uncertain, to ride at stote, till they can discern the most commodious Haven to winter in. To impute therefore fault unto the Parliament in such Cases, for want of Uniformity, and immutability of Counsels, is somewhat like the Notion that Batchelors conceit of Wives; they would have, but they do not know what: No other than *an Idea of their own fancy*.

Now if it be enquired which course prevailed, in order either to the King's Royalty, or the People's Liberty, I shall answer, Neither of these; but the House of *York* prevailed to hold the Crown, and might have advanced the Authority thereof, had they not fall'n out amongst themselves for the spoil; and *Edward* the Fourth was not altogether disposed thereto. The success that he had in the Field, and his Soldiery, made him look big like a King of the greater size; but Kings sleep not securely upon such Pillows. When the *Militia* is on horseback, it is as ready to be a Guard upon the King, as for him; and when it is most sober, not so easily governed as a Commonwealth. And therefore *Edward* the Fourth, now in Arms, though he found it a hard Notion to maintain the People's Liberty where no man is free from the Soldier, yet he inclined thereto. We read of a multitude
of

Reigns of Edw. IV. Edw. V. and Rich. III.

III

of *Taxations* of all sorts; and of *Benevolences*, the worst of all those sorts. For Soldiers must have money; or if not, they will have it: but the King would not force things so far as his power could reach; he will have Money, but it shall be by order of the Parliament. He might have pretended much upon the *Commission of Array*; yet did it not, but chose rather to be Lord of the Seas. And because it was too great a Farm for his private Purse, he prays aid of the Parliament by the way of *Tonnage* and *Poundage*, which was in demand nine years before the Parliament granted it. And when it was granted, it was with such restrictions, that it is evident the King preferred the right of the Parliament therein, above his private honour. ^{12 E. 4. n. 8.}

Secondly, *Tit'es of Honour* are but windy Notions; and every one knows what claim is made by Kings, to have the sole interest in conferring the same. This Edward the Fourth neglected so far, as he interested the Parliament, both in the conferring of them, and resuming the same. ^{17 E. 4. n. 10.}

Thirdly, *The Course of Trade* was now more especially looked to, not by the King and Privy Council, but by the Parliament. And because it was much decayed, partly by reason of the ill Government thereof, and partly by the excessive lavishness of these times, many Laws are made for remedy of both. And first, the *Staple* was settled sometimes at *Calais* alone, sometimes at it and *Middleborough*; and by this means, *England* gained Trade from both Nations; but the principal thanks is to be given to the interest between the King and the House of *Burgundy*. ^{3 E. 4. c. 1.}

Then course is taken for the bringing of the *Staple* Commodities only to those places, and the return to be made in Money and not Commodity by Exchange. Then for the well making of *Staple* Manufactures, and restraining Importation of Foreign Manufactures of such kinds. Then against transporting of *English Coin*, and importing of *Foreign Coin*, other than Bullion. ^{1 R. 3. c. 12.}

And as touching the second grievance, it seems gallantry or vanity of *Apparel* was a sore Disease of these times, which were become times of Fashions, and wherein the King led the way by his own example. For he desired to be brave; and that he might be more brave, he passed Laws that the people should be less brave, assessing a sort of *Apparel* for every degree, and therein stooped so low, as to define the fashions of their very Shoes. ^{4 E. 4. c. 1.}

Fourthly, The Parliament retained their ancient right of reducing the course of *Judicature*. For whereas *Sheriffs* had hitherto holden their course of Trial of the meaner sort of Felonies and Trespasses, and Offences, determinable only by Imprisonment, or Fines and Amerciaments; whereby Mens Estates did lie under the continual pillage of these covetous and extorting Officers; it was established by the Parliament, that these Men should have for the future, only power of enquiry, and to certify at the next Sessions, and there the Trial to be; and Fines and Amerciaments to be set, taxed, and estreated unto the Exchequer, and from thence to be levied, and thereof the *Sheriff* give account. This was a great security to the people's Estates, but gave them not a full remedy: For though the Trial was now more fair, yet these Officers were Judges of suspicion, and had still power upon suspicion to imprison their persons, and seize their Estates, under colour to save them for the King, in case Conviction followed. ^{1 E. 4. c. 22.}

For remedy hereof, the *Justices of the Peace* have now power given them to Bail, in case of light suspicion; and it is further declared, that no man's Estate shall be ^{1 R. 3. c. 3.}

The Condition of the Clergy.

be first seized, till Conviction and Attainder first be had. And because of Escheators grew no less burthensome in their way, it was therefore ordered, that no man shall be allowed in such Office, unless he hath Lands to the value of Twenty
 11. E. 4. c. 9. pounds *per Annum*; and that he shall be responsible for such wrong done by himself, or by his Deputy and Farmer.

Thus *Edward* the Fourth quitted himself like a King in many regards; but soon ran himself out of breath, gave his Lamp to his Son, that was too weak to hold it; a Third snatches it away, and for two years carrying it exceeding well,
 1 R. 3. c. 2. then yielded up all encroached Royalty to the People, and his Crown and Life to his Successor.

C H A P. XXV.

The Condition of the Clergy.

IF any gains were had in these uncertain times, the Church-men might seem to have them; having now this advantage, that the Commonalty was distracted with uncertain interests of the Succession of the Crown: And themselves only united under the Popedom, now freed from all Schism; and the Popedom managed by *Sixtus* the Fourth, who had the hap to be accounted more virtuous than any of his Predecessors had been, and to have all the *Christian Princes* wholly at his devotion.
 Naucier.

And lastly, *Both the Clergy and the Kings were now jointly engaged against the rising power of Religion, then called Heresy; in order whereunto the Clergy leading the way, had the applause of them that followed, upon an implicate Faith, that whatsoever was done by them, was exceeding well done.*

Nor was it wisdom for Kings that fate loose in their Thrones, to stumble the good Opinions of so considerable a party towards them. And therefore *Edward* the Fourth, in his first entrance, granted to the Clergy, that which could never be by them obtained from any of the foregoing Kings, viz. *Free liberty of Process in all Cases Ecclesiastical, and in Tythes of Wood above twenty years growth; and in case they were troubled upon the Statutes of Provisors, they should have their remedy in the Chancery against those Judges, and their Proceedings in such Cases there to be cancelled.*
 Antiq. Brit. 294.

This was done by Charter, and was sufficient to shew what the desire of the Clergy, and the intention of the King was, viz. *At once to favour the Church, and under colour of favour done to the Clergy, to cancel both Common and Statute-Laws of the Kingdom, by the power of the Chancellor's Decree: Nevertheless all this was but the King's breath; the policy changed never a whit the more.* For the Common Law held on its course, not only in Cases depending before the Holy Chair, but also

even before the Bishop of the Diocese at home; so as neither the King was concluded from his Suit, nor the party endamaged from his Action by any such
 5 E. 4. fol. 6.
 9 E. 4. fol. 3.
 7 E. 4. fol. 2.
 Per Littleton. Charter. And so far were the Judges of the Common Law from being bound by the Chancery in such Cases, that they professed they would not delay
 22 E. 4. f. 37. to grant the *Habeas Corpus*, to deliver any Prisoner by Decree of the Chancellor in any Case triable at the Common Law. Much less did the Parliament favour these men so far, as to give them any countenance in any way of gain upon themselves; but rather made bold with what the Church

Church-men in former times challenged as their own; and upon this account, whereas formerly it had inhibited Fairs and Markets upon the Lord's Day, now it inhibited the sale of Boots, Shoes, &c. upon that day, though done never so privately: which they did at the first only within the City of *London*, and three miles thereof. I suppose it was made only by way of trial, it being dangerous in such times to give a stop to all *England* at once; otherwise it might be wondered, why God's Honour should be better regarded in *London* than in all the Realm besides. Of this encroachment we find no complaint made by the Church-men; another touched them to the quick, although it befel only the Archbishoprick of *York*, that hitherto held ordinary Jurisdiction over all the Bishops of *Scotland*, as being their Provincial. Now it is disclaimed by them all; and they are backed therein by their King, under pretence of great inconvenience to his Bishops in their so far Travels; but in truth, not unlike to *Jeroboam*, though he pretended it was too much for them, yet he thought it unsafe for himself that his Bishops should owe Canonical Obedience to the Subject of another Prince; and upon this ground prevailed with Pope *Sixtus* the Fourth to make the Divorce, and left it to future Ages to try the validity thereof, if they would.

This is all that I shall observe of the Government of these three Kings, whose Reigns in the whole exceeded not twenty-six Years; and their compleat Power therein, not much above half so many.

C H A P. XXVI.

A short sum of the Reigns of Henry the Seventh, and Henry the Eighth.

THE course of *English* Policy hitherto wandring in the different Currents, springing from the double head of Monarchy and Democracy; and in them likewise often tossed up and down, partly by the blasts of windy Titles and Pretensions, and partly by the raging Tides from the *Roman* See, now begin to come to anchor within view of shore. Happy *England*, if the same prove good Harbourage for a fainting Nation! Two Kings now undertake the Steerage; the work of the first, was to still the Winds, the other the Seas, and so to bring the Adventure safe home. *Henry* the Seventh happened upon a good preparative for this work, in that he delivered the Kingdom from a Tyrant, whose irregular and bloody way was so odious to the people, that it set a foil upon his Successor's Government, and made his Wisdom, Valour, and Justice appear greater than possibly it was. His Valour made way for the other two; he had enough thereof to serve a wise man in case of extremity: at other times he made more use of his Majesty than Manhood; being confident that the people knew not where to mend themselves, but would be at his Devotion, so long as he was better than his Predecessor, though he cared not how little. His Wisdom was his greatest part, of which, upon all occasions, he made the greatest improvement he could, without reflecting upon Conscience, or Religion, whereof he had tasted no more than would render him a civil man; whereunto his Education did lead the way. Thus, though his Valour brought him to the Crown, yet it was his Wisdom that settled him in the Throne. For though he loved himself so well, that he was

X x

loth

loth to pretend allowance of any access of Foreign help to his own atchievement in his Title, or that he was guilty in the least manner in his entry upon the Throne; yet to keep danger far off, he provided one guard for his Person, and many for his Title.

That of his Person, he only pretended as a ceremony of State brought from the French Court; and yet it is strange that it went so well down with a Free People. For that Prince that will keep Guards about his Person in the midst of his own people, may as well double them into the pitch of an Army, whensoever he pleases to be fearful; and so turn the Royal power of Law, into force of Arms. But it was the French fashion, and the King's good hope to have all taken in the best sense.

His Title (setting aside the saying of Philip the Hardy, *That Kingdoms only belong to them that can get them*) would hardly endure the touch, till Pope Innocent by his Bull confirmed the Crown to him, to hold by a six-fold right, viz. Of Inheritance, of War, of Espousals, of Election, of Gift by Parliament, and lastly, of Pontifical Benediction; which the King liked marvellous well; and the rather, because his Title by Marriage was buried up in the middle, and so made the less noise. For though it was his best guard, yet he liked not that it should be so reputed, lest his Title should seem rather conferred upon him, than gained by him; and so should hold by a Woman, or at the best by the courtesy of England, if the People's favour should so far extend the Law in that point; by both which he holds the honour of a compleat English King diminished. His Title by Inheritance is much disputable, if the right Heirs of John of Gaunt be enquired after: And much more that of War; for although that brought the Possession, yet no Right or title, but by wrong; which may indeed be plaistered over by Election or Act of Parliament; but then he must be Tenant to the People. As touching the Pontifical Benediction, himself took that but as a redundancy, that might sway with the Clergy, and do his Title no hurt. Nevertheless, what severally they cannot do, by joint concurrence he accounts so fully done, as if he were a King against all the World, and more. Yet is he not sure enough, but as one jealous is more tender, so is his eye ever upon his Title; there is his guard, and regard; as if it were the outworks of his Crown, which once lost, the Crown cannot hold out long. In this work he minded so much his Greatness, that he lost the repute of his Goodness. Then casting his eye upon the Government, and finding it of a mixt temper, wherein if Royalty prevails not, Popularity will; like a good Soldier, whilst his strength is full, he sallies upon the people's liberties, in regard of their persons, with such cunning conveyance, as he taught the People to dance more often and better to the tune of Prerogative and Allegiance, than all his Predecessors had done. Nor did the people perceive it, till they were over their shoes; and then they clearly saw their condition, and that it was in vain for them to wrangle with their own Acts; of which more particularly in the next Chapter. The Legiance of the persons of the People once gained, their Estates more easily follow: and therefore though in the former he wrought by Ambuscado, in this he may be more brave, and charge them in the Van. Yet this he did also by degrees; first by light skirmishes of borrowing smaller sums of money (possibly when he had no need) and paying them again, thereby to gain credit for greater sums, of which he intended not so sudden return. Then he charges them home with Benefolences; (a trick gained in right of his Wife from her Father) for he hoped that

Thevet. lib.
4. c. p. 32.

Jovius Brit.

that the person of *Richard* the Third was now become so abominable, as his Laws would be the less regarded. But in this course he gained nothing but Wind. Then (as *Edward* the Fourth) he falls upon *Malevolences of Penal Laws*; things made *in terrorem*, to scare men to obedience, rather than to compel them; but are now executed *ad angorem*; and the people find that he is but a word and a blow with them: and thus, serving his Prerogative with Power, and his Purse with his Prerogative, he made all serve his own turn, *Humanitatem omnem vincente periculo*. Justus Brit. fol. 9.

In the Field he always put his wisdom in the Van; for as he was parsimonious in expences of Money, so much rather of Blood, if he could prevail by Wit. Generally he was the first in Arms, to make men believe he was more ready to fight than they. Thus he many times gained the advantage of his Adversaries, and sometimes came off without blows. In the Battle he did put on Courage as he did his Armour, and would dare to adventure just so far as a General should; as if he had ever regard of his Crown, rather than of the honour of a forward Soldier; which nevertheless was also so dear to him, as he is seldom found in the Rear, although his Judgment commanded in chief, rather than his Courage. In the Throne he is much more wise, because he is willing it should be known. In doing Justice he is seldom suspected, unless where himself is party; and yet then he is also so shame-faced, as he would ever either stalk behind some Law that had a semblance to his ends, or when he meant to step out of the way, he would put his Ministers before; not so much that his *Fineness* might be known, but his *Royalty*. For the Lyon hunts not his own prey, nor is it regal for a King to be seen in catching of Money, though he be understood. Besides, it was needless; he had *Lords*, *Bishops*, *Judges*, and other Instruments of Malevolent aspects, as so many Furies, outwardly resembling men for the Commonwealth, but working for the common mischief; like some Pictures, one way looking right, and another way looking wrong. And thus the King comes lawfully by what he caught, though his instruments did not; and must be still holden for a good King, though it be his hard hap to have ill servants. Take him now amongst the people, he is alike to all, yea in some things that might seem to brush upon the King's own train; for he had some of his suit that were not altogether of his mind, and these he would spare to the course of Justice if need were. As it befel in the case of the Duke of *Suffolk*, whom he suffered to be tried at the King's-Bench Bar, for a Murder done upon a mean person, and by such means obtained the repute of a zealous *Justiciar*; as if Justice had been his principal virtue. All this suited well with his main end; for he that will milk his Cattle, must feed them well; and it encourages men to gather and lay up, when they have Law to hold by what they have.

His *Religion*, I touch upon in the last place, as most proper to his temper; for it was the last in his thought, though many times the first in the acting. But where it stood in his way, he turned it behind him; he made Church-men his instruments, that the matter might better relish; for who will expect aught save well, from *men of Religion*? and then if the worst come, he was but misled by such, as in common reason ought to be trusted. And it is his unhappiness to meet with *Clergy-men* to serve a turn, and a Pope to give his Benediction to all. Nor was this *gratis*; for there were as many mutual engagements between the *Clergy*

and him, as any of his Predecessors of the House of *Lancaster* besides. Lastly, It may well be supposed, however wise this King seemed to be, that many saw through him; which procured him a troublesome Reign, though many times occasioned by his own interposing in Foreign Interests, wherein he suffered more from others than they from him. Amongst the rest, the Dutcheſs of *Burgundy* (though a Woman she were) mated him with Phantoms and Apparitions of dead Bodies of the House of *York*; the scare whereof put the King and all his people in alarm; and striking at idle shadows, slew one another. All which, together with the appearances of *Collections*, *Taxes*, and other accoutrements to furnish such employments, were enough to disturb that ease and rest that the King aimed to enjoy; make him burthensome to his people, and both himself and them weary of each other. And so he went down to the Grave with but a dry Funeral; leaving no better testimony behind him, than that he was a cunning man, rather than a wise *English* King. And though he died rich, yet he is since grown into debt to the Pen-men of his story*, that by their own excellency have rendred him a better King than he was.

* i. e. Lord
Parr, &c.

Henry 8.

Henry the Eighth was a Conception in whom the two Bloods both of *York* and *Lancaster* did meet, both of them unconquered, both of them predominant; and therefore no wonder if he was a man beyond the ordinary proportion of other men in stature of Body, and in qualities of Mind not disproportionable. It is regularly true, that great Bodies move slowly; but it holds not where much Spirit is: and it was the condition of this Prince to have a Spirit of the largest size, that acted him into motion with no less speed than mighty power. This himself understood right well, and therefore might be haughty upon a double Title, both of Purchase and Inheritance. Nor did he fail of expectation herein; for he could not endure that man that would own his right in competition with the King's aims, and therefore would have his Kingdom be like his Doublet, to keep him warm, and yet sit loose about him, that he might have elbow-room. Suitable hereunto were his undertakings, invited thereunto by the inordinate motions, or rather commotions of his neighbouring Princes: For it was now full Sea in all Countries; and though *England* was inferiour to some of them, yet the King held it dishonourable for him not to adventure as far as the bravest of them; and in the end out-went them all. What he wanted in number, he supplied in courage; wherein he so exceeded, that he avoided dangers rather out of Judgment than Fear. His Thoughts, Resolutions, Endeavours, and Actions, were all the birth of Occasion, and of each other; as if he had obtained a general Pass from Providence, with warranty against all Counter-guards whatsoever.

His Wisdom served him to espy present opportunities, rather than to foresee them; and therefore was not so crafty as his Father in preventing occasions, yet more dextrous in giving them the rout. For he could manage his hand and foot better than his Father, strike downright blows; and rather than he would fail of his ends, would make one, as many times he did.

Another advantage he had of his Father: for considering the times, he was a learned King, which made his Actions carry more Majesty, and like

a well-feathered Arrow from a strong hand, drive through the wind steadily to the mark: Whenas his Father, like a weak Archer, must raise his compass, and crave aid of the Wind to help him to be right in the end.

It is affirmed by some, that *Henry* the Eighth was courteous, and debonair; if so, he must thank his Education: but it may be rather supposed, that upon occasion he used the art of Insinuation, which he might learn both from the Father-side and Mother-side; but he neither practised it much, nor did he rely upon that skill; for his resolution led him to cut the knot that he could not unty. His Learning led him most to Divinity, and therein shewed him light enough to see much into the Mystery of Iniquity, which he did explain to the World passing well; but as touching Devotion, he left that to the care of the Church-men.

He was very well accommodated with Money: First, from the full Coffers left by his Father, much whereof he spent in Pastimes and Gallantry, as he was Heir to *Edward* the Fourth; and much also in his Devotion to the Pope, as he was Heir to *Henry* the Seventh; in lieu of all which, he was rewarded with a Title, *Defender of the Faith*; and so of much ill gotten, was much ill spent. But a better supply he had when *Rome* and he parted asunder, and the Current of the Riches of the Clergy was stopped from running at waste, and returned into the King's own Treasury; and so might have died the richest Prince in the World, but that he wanted the main Clause in the Conveyance, *To have and to hold*. The Wisdom of God so ordered it; for these felicities were too great and many for any moderate spirit to bear gently, much more for the King's Spirit, that was ever on the Pinnacle, and grown to that height, that like an embossed Stag, none must cope with him, he must run and out-run all; none must cross him under extreme peril; no good is to be done, but by following afar off. Nor is it a full wonder, if in this his heat he knows neither faithful Servant, Counsellor, nor Wife, but strikes at all that stands in his way. Nevertheless, in his cool temper, and when he was entangled with some perplexed occasion, he could use the advantage of good Counsel, and the wits of others that were more crafty than himself. Wherein it was his good hap to have some ever nigh him that were for his turn, and unto them he committed much, that himself might be at ease to hear good news of successful dispatches.

In his youth he was served by the wise Counsellors trained up by his Father; and he then willingly enough, for his pleasure, was contented by their advice to serve his people for a time, that they might be his Servants for ever. The Two ^{Empson and Dudley.} great Conduit-Pipes of this Treasury, which he had from his Father, he cut off at his people's request, as if he loved his People above all his Riches. And after that, he laid aside his pleasures and youthful company, to apply himself more closely to the affairs of his Kingdom, as if he loved that above all pleasure: which nevertheless stuck to him so long as he lived, and swayed too much in the greatest Affairs of his Government.

Thus the first heat of his course was run well, so long as the Privy Council continued moderately poised. But no sooner began one of them to put up beyond his place, and to bid adieu to the advice of all the rest, but he gets the uppermost seat in the King's Head, makes a Foot-stool of the King's Heart, and then it is two to one

The Government of Hen. VII. and Hen. VIII.

one that the people in such cases must bear the greater burthen: For whoever first said it, he said most true, *That Prerogative in the hand of a King, is a Scepter of Gold; but in the hand of a Subject, it is a Rod of Iron.* The Reign of this King, Henry the Eighth, serves us with much experience of this kind; for if the consideration of the Affairs of this Government should be divided, the same would be double: the one under the *Regiment* of Cardinal *Wolfey*; the other of the King, by *Cromwel*, *Cranmer*, *Gardiner*, and others interchangeably. I call that of *Wolfey* a *Regiment*; for he was in the nature or condition of a *Pro-Rex*, during the King's Juvenility. This Temporizing Fortune thus super-induced upon a Cardinal, (raised from mean degree to be *Legate à Latere*, courted by Foreign Princes, flattered by the Emperor with Titles of Son and Cousin) made him lead a dance, that the King (however active he was) is put to his career to hold him company; which the King perceiving, tripped up his heels, and left the *Archbishop*, the *Chancellor*, the *Cardinal*, the *Legate*, and many more with him, lying on the ground. No pride like to that of the Clergy, whose parts are more sublime, and apprehensions clear; and if God addeth not a superiour Work to rule over all, a little honour will blow up all with powder. The King having thus matched the Cardinal, forgot his former natural pace; and once in a heat, could cool no more till death cooled him. He knew by experience, that the Cardinal could over-awe the people; why should not the King do as much? If the Lords stooped to the Cardinal, why not much rather to the King? The Cardinal pulled down, reared up, turned square to round; why should he be less than his Subjects? Such conceits as these soon wound up the King's mind to that height, that it is death to him to stoop one inch lower to more moderate advice, though he loved their persons never so well: but all must be content with the weight of his arm, though it were no small one; and yet in point of Religion, affairs tended to a kind of Reformation all this while.

C H A P. XXVII.

Of the State of the Crown.

THAT the Crown of *England* now abounded more in Flowers than Crosses, the Face of Story doth hold forth to ordinary Observation; and yet few are satisfied, either in the true nature of the particular advantages, or in the manner how they were obtained, or in the continuance. I must therefore make a little stop upon them, because in the true discerning of them, the discovery of the nature of the Government in latter days doth much depend. Hitherto the Crown came short of absolute power over the people, upon two grounds in observation; one relating to the *Clergy*, the other to the *Laity*.

The Church-men were heretofore under a Foreign Power, and a Foreign Law; against which, Kings durst not deeply engage: either not being assured of their own Title, or employed in pursuit of other game; or being of a weak Spirit, were scared with the Thunder-bolt of the Pope's Curse. But the Laity were under another Law, and such an one, as by clear and unquestionable Custom, had established

blished bounds, between the way of Kings, and the Rights of the People. Neither did Kings directly invade those Borders, either led thereto by a kind of Conscience in such of them as were morally inclined, or in others by a kind of fear of raising up Earthquakes from beneath, which commonly do overthrow high Towers sooner than Winds from above. But now such interests are laid aside, fast asleep, by two Kings: Whereof one cared not much for *Fear*, and neither of them for *Conscience*. For *Henry* the Seventh, having leisure to study the Nature, and contemplate the Fashion of the *English* Crown, dislikes the Model in some particulars. It was not rich enough, nor well poised to his mind, which ever was, not to be poor, but towards his latter time to be exceeding rich; as supposing that to be the only way to be more desirable to Friends, formidable to Enemies, and absolute over his People. But this opinion of his missed in the main end, though it attained his immediate desire. For by mistaking the right way, it made a rich King, but not a rich Crown. He delighted more in the riches of his People, than in a rich People: and this bred no good blood, because the People thought that the Law was not on his side in that matter. They suffered him to visit their Purses; but are loth it should prove customary, lest they should lose their Common Right. They therefore chose rather to give him power by Act of Parliament, to *revoke* Letters-Patent, and Grants, and make resumptions of Offices, Fees, Annuities, and the like; that he might rather repossess his own, than possess theirs. Many Penal Laws likewise of a limited and temporary regard are made; and as Cheese after a full Dinner, they close up all with *Subsidies*. For it was evident to all men, that the Royal mind of the King served no further than to take what was given; provided that the People would give, what else would be taken. By this means *Henry* the Seventh left rich Coffers to descend to *Henry* the Eighth; but the Crown was still the same in price.

In this Act of the Play, the People carry away the plaudite. The second Act was the point of *Allegiance*, wherein both parts carry themselves so cunningly, as it is hard to adjudge the Garland; yet it may be thought the King observed it rather, because he offered all the play, whilst the People did only lie at their close guard. The whole project consisted in this, to gain a more absolute *Allegiance* from the *English* to their King. And because this is exemplified partly in War, and partly in Peace, that part which concerneth War, will more properly fall under the consideration of the *Militia*: and therefore I shall refer the same to that head, in the 32d Chapter ensuing; and will come to the second consideration of *Allegiance* in relation to Peace, and therein touch upon the King's power in making of Laws, and of Judicature according to those Laws. As touching the *making of Laws*, the ingenuity of *Henry* the Seventh could not suffer him to make any claim thereto in any positive way; yet his Actions declare that his heart was that way. For being beset with troubles, he could often fancy dangers, and arm himself; then call a Parliament, who were wise enough to grant as readily as he asked, rather than to be compelled thereto. So he had Laws made according to his own Will, though he made them not.

The matter of *Judicature* comes next; and therein he made his Judges appear, and not himself; though they did not only represent his person, but his mind: so things were done according to his mind, though he did them not. And thus his Excellency seemed

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seemed more eminent in finding and making instruments fitting to do his work, than in doing his own work. Nevertheless, all this was but from hand to mouth; no fundamental Law is altered all this while: If the Laws were made by Parliament, the King made them not: If the Judges turned the Law to the King's ear, the Law was still the Crown, though the King wore it. But *Henry* the Eighth was no such man, he had not this skill of undermining, nor desired it; he was tender of the least diminution of his Honour, industrious in finding out the occasion, and a most resolved man to remove it out of the way, though it reached as high as the Triple Crown. A man underneath many passions, but above fear. What need he care for pretences? his Father loved Riches, he Power. When he came to traverse his ground, he found quickly where the Church-men trespassed upon him; and began with them, resting upon the wisdom of his Father, and the infallibility of the Pope. *Henry* the Eighth had taken to Wife *Katherine* his Brother's Dowager, and continued in that condition Eighteen years without wrinkle of Fame, till the great Success of *Charles* the Fifth, the Queen's Brother, against the Pope and *French*, scared the King into a jealousy of his greatness; and the Emperor's failing in courtesy to Cardinal *Wolfey*, the King's *Acbates*, stirred the Cardinal's spirit to revenge, for the loss of his hopes in the Poppedom. For the Cardinal finding the King's mind to linger after another Bedfellow, by whom he might have a Son, he made the *French* Embassador his Instrument to mind the King of his unlawful Marriage with the Queen, and to mention unto him *Margaret D' Alanfon* a Princess of *France*, both in Blood and Beauty. The King liked the notion of Divorce, but disliked the motion concerning the *French* Lady, himself being prepossessed with a fair Object at home, the Lady *Anne Bullen*, then attending upon the Queen. And thus being moved, he entred into a scrutiny concerning the condition of his Marriage; wherein he had been formerly touched, both by the *French* and *Spaniards* themselves, upon several motions made.

Thuan. lib. 1.

Jov. hist. fol. 31.

Fox.

Sleidan. lib. 9.

First, between *Charles* the Fifth, and afterwards between the *Dauphine* and the Lady *Mary*, afterwards Queen. Hereat the Cardinal winked all the while, till the infallibility of the Chair of *Rome* came upon the Stage; then bestirring his Wits, he lodged the Case upon Appeal thither, as he hoped beyond all further Appeal; and so held the King there fast, till himself might accomplish his own ends. But the Wheel once set a running, would not stay. The King espies the Cardinal in his way, and bears him down: Then finding the fallacy of the infallible Chair, he hearkens after other Doctors, follows their light: and being loth to hear what he expected from *Rome*, he stopped the way to all Importation of such Merchandize as might be any ways prejudicial to the Prerogative Royal, with the penalty of the loss of Land, or Liberty and Fine; the two latter being formerly warranted by Law. The first served as a scare: for (though it were but by Proclamation) Men might justly fear that he who was so stout against the Pope, would not stick to scourge his own Subjects out of his way in the time of his heat.

The King thus entred the Lists both against Pope and Cardinal now under *Præmuniri*, (whereof he died) meets the *English* Clergy (thus losing their Top-gallant) standing up in the Rear against him, and talking at large. Nevertheless, the King stops not his career, puts them to the rout for maintaining the *Power Legatine*. They soon submit, crave pardon, give a Sum of Money, and perfume their Sacrifice with that sweet Incense

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Incense of *Supreme Head of the Church of England*. This was done, not by way of Donation, (for the Convocation had no such power) but by way of acknowledgement, in flat opposition to the Jurisdiction of the *Pope*. It became the common subject of discourse amongst all sorts, but of wonderment to the *Pope*. Yet for fear of worse he speaks fair; for he was not in a posture to contest; but all would do no good. The Queen had appealed to *Rome*; the *Pope* by *Wolfey's* advice makes delays. The Parliament espying the advantage, at once took all Appeals to *Rome* away, and established all Sentences made or to be made within this Land, notwithstanding any Act from *Rome*; and enjoined the *English* Clergy to administer the several Acts of publick Worship, notwithstanding any Inhibition or Excommunication from any Foreign pretended Power. The grounds upon the Preamble of the Law will appear to be Two.

1531. An. Antiq. Brit.

Jovius Brit. fol. 20.

Sleidan lib. 9.

24 H. 8. c. 12.

First, *That the King of England is Supreme Head in rendring Justice within the Nation in all Causes therein arising*; which is more than the Recognizance of the Clergy, two years before this Act, did hold forth. Yet this acknowledgement is not absolute, but in opposition to Foreign Pretensions.

Secondly, *That the Clergy in England having power, may in matters Spiritual determine all Doubts without Foreign help, and administer such Duties as to their place do belong*. Not hereby determining, that the Church-men ever had such power by Law, nor that they ought originally to have such power. They never had it; for no sooner were they dis-joined from the *Laity* in these affairs, but immediately they were under the *Pope*, and received their power from him. And, *de Jure*, they cannot challenge such power, but by a positive Law, such as this Law of *Henry the Eighth*, which also giveth but a restrictive and limited power, viz. *In matters Testamentary, of Divorce, Matrimony, Tythes, Oblations, and Obventions*. So as if they will challenge such power, they must thank the Parliament for it, and use the same accordingly as persons deputed thereunto; and not in their own right, or right of their places. In all this the King's *Supremacy* is but obscurely asserted, and rather by implication shewing what in reason may be holden, than by declaration of what was; making way thereby,

First, Into the Opinions of men, before they were enjoined to determine their Actions: but within Two years ensuing, or thereabout, the Law is made positive.

The King shall be taken and accepted the only Supreme Head on Earth of the Church of England; and have power to visit, correct, repress, redress, reform, restrain, order, and amend, all such errors, heresies, abuses, offences, contempts, and enormities, as by any manner of *Spiritual Authority, or Jurisdiction, ought or may lawfully be reformed*.

26 H. 8. c. 1.

Which in the Preamble is said to be made to confirm what the Clergy in their Convocation formerly had recognized. The corse of this Act is to secure the King's Title, the King's Power, and the King's Profit. As touching the King's Title, it is said, *that in right it did formerly belong to him*; which is to be granted by all, so far as the power is rightly understood. But as touching the King's Profit, it cannot be said that the whole lump thereof did belong to the King, because much

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thereof

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thereof was not so ancient, but *de novo* raised by the Pope's extortion; and therefore the true and real profits are by particular Acts of Parliaments ensuing, in special words devolved upon him. The nature of this power is laid down in this Statute under a threefold expression.

First, It is a *visitatory*, or a reforming power, which is executed by enquiry of Offences against Laws established, and by executing such Laws.

Secondly, It is an *ordinary Jurisdiction*; for it is such as by any Spiritual Authority may be acted against Irregularities: And thus the Title of *Supreme Ordinary* is confirmed.

Thirdly, It is such a power as must be regulated by Law, and in such manner as by any Spiritual Authority may lawfully be reformed. It is not therefore any absolute *Arbitrary Power*; for that belongs only to the Supreme Head in Heaven. Nor is it any *Legislative Power*; for so the Law should be the birth of this power, and his power could not then be regulated by the Law: nor could every Ordinary execute such a power; nor did Henry the Eighth ever make claim to any such power, though he loved to be much trusted.

Lastly, This Power was such a Power as was gained formerly from the King by Foreign Usurpation, which must be intended *de rebus licitis*, and once in possession of the Crown, or in right thereto belonging according to the Law. For the King hath no power thereby to confer Church-livings by Provisorship, or to carry the Keys, and turn the infallible Chair into an infallible Throne. In brief, this power was such as the King hath in the Commonwealth; neither Legislative, nor Absolute in the executive, but in order to the Unity and Peace of the Kingdom. This was the Right of the Crown which was ever claimed, but not enjoyed further than the *English Sceptre* was able to match the *Romish Keys*. And now the same being restored by Act of Parliament, is also confirmed by an Oath enjoined to be taken by
 28H. 8. c. 10. the people, binding them to acknowledge the King under God *supreme Head on earth*
 35 H. 8. c. 1. of the Church of England, Ireland, and the King's Dominions, in opposition to all
 35H. 8. c. 3. foreign Jurisdiction.

And lastly, by a Law which bound all the people to maintain the King's Title of *Defender of the Faith, and of the Church of England and Ireland, in Earth the supreme Head*, under the peril of *Treason*, in every one that shall attempt to deprive the Crown of that Title.

We must descend to particulars; for by this it will appear that these general Laws concerning the King's refined Title, contained little more than matters of Notion, otherwise than a general bar to the Pope's future interests: And therefore the Wisdom of the State (as if nothing had been already done) did by degrees parcel out by several Acts of Parliament the particular interests of the Pope's usurped Authority, in such manner as to them seemed best.

And first, concerning the *Legislative Power* in Church-Government: It cannot be denied but the Pope, *de facto*, had the power of a Negative Vote in all Councils; and unto that had also a binding power in making Laws, Decrees, and Decretals out of his own breast: but this was gotten by plunder; he never had any right to head-

headship of the Church, nor to any such Power in right of such preferment; nor was this given to the King as Head of the Church, but with such limitation and qualifications, that it is evident it never was in the Crown, or rightly belonging thereto.

First, Nigh three years after this Recognition by the Clergy in their Convocation, ^{25H. 8. c. 19.} it is urged upon them, and they pass their promise, *in verbo sacerdotii*.

And lastly, It is confirmed by Act of Parliament, *That they shall never make, publish, or execute any new Canon, or Constitution Provincial, or other, unless the King's Assent and Licence be first had thereto*; and the offences against this Law, made punishable by Fine and Imprisonment: So as the Clergy are now holden under a double Bond; one the honour of their Priesthood, which binds their Wills and Consciences: the other, the Act of Parliament, which binds their powers, so as they now neither will nor can start. Nevertheless, there is nothing in this Law, nor in the future practice of this King, that doth either give or assert any power to the King and Convocation to bind or conclude the Clergy or the People, without an Act of Parliament concurring, and enforcing the same. And yet what is already done, is more than any of the King's Predecessors ever had in their possession.

A second Prerogative was a definite power in point of Doctrine and Worship. For it is enacted, *that all Determinations, Declarations, Decrees, Definitions, Resolutions and Ordinations according to God's Word, and Christ's Gospel, by the King's Advice, and Confirmation by Letters patent under the Great Seal, at any time hereafter made, and published by the Archbishops, Bishops, and Doctors now appointed by the King, or the whole Clergy of England, in matters of the Christian Faith, and lawful Rites and Ceremonies of the same, shall be by the People fully believed and obeyed under penalties therein comprized: Provided that nothing be done contrary to the Laws and Statutes of this Realm.* A Law of a new birth, and not an old Law newly revived or restored. This the present occasion, and the natural constitution of the Law, do fully manifest. The occasion was the present perplexity of the people; for instead of the Statute *ex officio*, which was now taken away, the *Six Articles*, commonly called the *Six-Stringed Whip*, were gotten into power by a more legal ^{25H. 8. c. 14.} and effectual Original. The Parliament had heard the cries of the People concerning this: and having two things to eye at once; one to provide for the People's ^{31H. 8. c. 14.} Liberty, and further security against Foreign pretensions; the other (which was more difficult) for the liberties of the Consciences of multitudes of men of several Opinions (which could not agree in one judgment, and by discord might make way for the *Romish* party to recover its first ground.) And finding it impossible for them to hunt both games at once, partly because themselves are divided in opinion, and the bone once cast amongst them might put their own co-existence to the question; and partly because the work would be long, require much debate, and retard all other affairs of the Commonwealth, which were now both many and weighty: In this troubled wave, they therefore wisely determine to hold on their course in that work which was most properly theirs, and lay before them. And as touching this matter concerning Doctrine, they agreed in that wherein they could agree, *viz.* To refer the matter to the King and Persons of skill in that mystery of Religion; to settle the same for the present, till the Parliament had better leisure, the People more light, and the minds of the People more perswaded of the way. Thus

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the Estates and Consciences of the people for the present must endure, *in depositio* of the King and other persons, that a kind of *Interim* might be composed, and the Church for the present might enjoy a kind of twilight, rather than lie under continual darkness, and by waiting for the Sun-rising, be in a better preparation thereunto. For the words of the Statute are, That all must be done without any partial respect or affection to the *Papistical* sort or any other Sect or Sects whatsoever. Unto this Agreement both parties were inclined, by divers regards. For the *Romanists*, though having the possession, yet being doubtful of their strength to hold the same, if it came to the push of the Pike, in regard that *the House of Commons wanted Faith*, as the Bishop of *Rochester* was pleased to say, in the House of Lords; and liberty of Conscience was then a pleasing Theme, as well as liberty of Estates, to all the People.

These men might therefore trust the King with their interests, having had long experience of his Principles; and therefore as *Supreme Head*, they held him most meet to have the care of this matter: for still this Title brings on the Van of all these Acts of Parliament. On the other side, that party that stood for Reformation, though they began to put up head, yet not assured of their own power, and being so exceedingly oppressed with the *six Articles*, as they could not expect a worse condition, but in probability might find a better; they therefore also cast themselves upon the King, who had already been baited by the *German Princes* and *Divines*, and the outcries of his own People; and possibly might entertain some prejudice at length, at that manner of Worship, that had its original from that Arch-enemy of his Head-ship of the Church of *England*. Nor did the issue fall out altogether unsuitable to these expectations: For the King did somewhat to unsettle what was already done, and abated in some measure the flame and heat of the Statute, although nothing was established in the opposite thereto, but the whole rested much upon the disposition of a King subject to change.

Slidan, lib 9.
Anno 1535.

As touching the constitution of this Law; that also shews that this was not derived from the ancient Right of the Crown now restored, but by the positive concession of the People in their representative, in regard it is not absolute, but qualified and limited diversly.

First, This power is given to this *King*, not to his Successors; for they are left out of the Act, so as they trusted not the King, but *Henry the Eighth*, and what they did was for his own sake.

Secondly, They trusted the King, but he must be *advised by Counsel of men of skill*.

Thirdly, *They must not respect any Sect, or those of the Papistical sort*.

Fourthly, *All must be according to God's Word, and Christ's Gospel*.

And lastly, *Nothing must be done contrary to the Laws and Statutes of this Realm*.

And thus tho' they trusted much, yet not all, nor over-long. For it was but a temporary Law, and during the present condition of affairs. Nor did the King or People rest upon this Law; for within three years following another Law is made to confirm what was then already done by the King; and a larger power granted to the King, *to change and alter as to his Wisdom shall seem convenient*. Thus the King's Injunctions already set forth were established, all opposal to them inhibited; and the King hath a power of Lawing and Unlawing in Christ's Kingdom, and to stab an Act of Parliament in matters of highest concernment. And the reason is, the King

34 & 35 H. 8.
c. 1.

King will have it so, and who dares gainsay it? as *Cranmer* said, *The King loves his Queen well, but his own opinion better*: For new things meeting with new love, if it be once interrupted in the first heat, turns into a displeasure as hot as the first love. Nor had either party great cause to boast in their gainings; for none of them all had any security, but such as kept close to a good Conscience.

All this, though much more than any of his Predecessors ever attained was nevertheless not enough till his Title was as compleat. The Pope had fashioned him one now above twenty years old, for his service done against *Luther*, and others of that way, and sent it to him as a Trophy of the Victory; this was, *Defender of the Faith*; which the King then took kindly, but laid it up till he thought he had deserved it better; and therefore now he presents it to the Parliament; who by a Statute annexed it to the Crown of *England*, for ever now made triple, by the Royalizing of that of *Ireland* amongst the rest. Antiq. Brit. 35 H. 8. c. 3.

A third Prerogative concerned the King's power in temporal matters. And now must *England* look to itself; for never had *English* King the like advantage over his People as this man had. His Title out-faced all question; left rich by his Father, trained up in the highest way of Prerogative, absolute Lord of the *English* Clergy, and of their Interest in the People; of a vast spirit, able to match both the Emperor and *French* abroad, and yet more busy at home than all his Predecessors. A King that feared nothing but the falling of the Heavens; the People contrarily weary of Civil Wars, enamoured with the first tastes of Peace and Pleasures, whiles as yet it was but in the blushing child-hood, over-awed by a strange Giant, a King with a Pope in his belly; having the Temporal Sword in his hand, and the Spiritual Sword at his command, of a merciless savage nature, but a word and a blow, without regard even of his bosom Companions: What can then the naked relation of a Subject do with such an one? if Providence steps not in, and stops not the Lion's mouth, all will be soon swallowed up into the hungry maw of Prerogative. To set all on work, comes *Stephen Gardiner* from his Embassy to the Emperor: sad apprehensions are scattered, that the motions abroad are exceeding violent and sudden; that the Emperor and *French* King are fast in nothing, but in change according to occasion; that like the Eagle they make many points before they stoop to their Prey; that if the motions at home do wait upon debates of Parliament, things must needs come short in execution, and the affairs of this Nation extreamly suffer. A dangerous thing it is, that the King should be at disadvantage either with the Emperor or *French* King, for want of power in these cases of sudden exigencies, and for some small time, during the juncture of these important affairs, that seeing likewise at home the point concerning Religion is coming to the Test, the minds of men are at a gaze; their Affections and Passions are on their Tiptoes. It is reason the King should steer with a shorter Rudder, that this care might meet with every turn of Providence, which otherwise might suddenly blow up the Peace and good Government of this Nation. These and the like represented a fair face to that which followed, and made way for the King without shame to ask what no King before him suffered ever to enter into conceit; I mean a *Legislative Power*, to this effect, *That Proclamations made by the greater part of the King for the time being, and his Council, whose names hereafter follow, with such penalties as by them shall be thought meet, shall be of equal force to an Act of Parliament, provided it shall not extend to the forfeiture of Estates or Privileges, nor to loss of Life,* (but in cases particularly 31 H. 8. c. 3.

particularly mentioned in the Law) *Provided no Proclamation shall cross any Statute, or lawful or laudable Custom of this Realm.* All which at length comes to be demanded by a formal Bill, with as ill-favoured a Preface as the matter itself; which was much worse, e'er it was well lick'd in the House of Commons; and when all was done, proved a Bear still. Whatever it was, it passed in manner abovesaid, neither much to the desire of the *Commons*, that so much was given; nor to the good liking of the *King*, that there was no more: For instead of a Legislative Power, which he grasped at for himself, he received it in common with his Council; and so becomes engaged neither to alter nor destroy that [nominated] Brotherhood, if he intended to reap any fruit of this Law; leaving the point in doubt whether his Gain or Loss was the greater. For this Law, thus made for this King, these Counsellors, and these times and occasions, can be no Precedent to the future, unless to inform Kings that the Parliament hath a power to give more Authority and Prerogative to Kings than they or the Crown have by common Right; and to give it with such limitations and qualifications as seemeth good to them.

And secondly, That even *Henry* the Eighth acknowledged that the *Legislative Power* was not in the Crown; nor was the Crown capable thereof, otherwise than it was conferred by the Parliament. Only *Stephen Gardiner* might glory in this Atchievement, having for the present obtained much of his ends, by perswading the King, that Foreign Princes estranged from him, not so much for his departure from the Pope, as for some apprehensions they had of his departure from that way of Religion and Worship, which they apprehend every *Christian* ought to maintain. And therefore if he meant to gain better correspondency amongst these Princes, he must engage more resolutely to the Fundamentals of the Worship, though he shook off some slighter Ceremonies with the *Romish* Supremacy; for he knew that they were willing enough with the latter, though the other could not go down with them. Thus did Foreign Correspondency float above, whenas the Church, as then it stood, was underneath, and gave the tincture to every Wave. And it was holden more safe by the *Romish* party to trust the King (thus attempered) with the *Legislative Power* in the Church-matters, than the rough Parliament, whose course steered quite wide from the *Roman* shore, as if they never meant to look that way any more: though *Cranmer*, and the chief Officers of State, and of the Household, were by the Law Judges of the matter in fact, as well as the King, yet in the conclusion the King only was of the *Quorum*. All this yet further appears in the penalty; for by a *Proviso* it is moderated, as to all forfeitures of *Life*, *Limb*, or *Estate*; and in the conclusion extended only to *Fine* and *Imprisonment*, unless in some cases mentioned, and excepting offences against Proclamations made by the King or his Successors, concerning Crimes of *Heresy*. For it is the first Clause of any positive Law, that ever intimated any power in the King of such Cognizance and Punishment of *Heresy*. Too weak a principle it is to settle a Prerogative in the King and his Successors, as *Supreme Head of the Church*, thus by a side-wind to carry the Keys of Life and Death at their Girdle; and yet a better ground cannot I find for the Martyrdom of divers brave Christians in those times, than this touch of a Law glancing by. All which passing *sub silentio*, and the Parliament taking no notice thereof, made way for the Statute 38 H. 8. c. 26. formerly mentioned, to come more boldly upon the Stage.

This was one wound to the *Legislative Power* of the Parliament, thus to divide the same. Another ensues, that in its consequences was no less fatal to that power which remained; and it was wrought by some Engine that well saw that the Disease, then so called, grew to be epidemical amongst the more considerable party in the Kingdom; that the Lady *Jane Seymour* (now Queen) was no friend to the *Romanists*; that she was now with Child; which if a Son, (as it proved to be) was like to be Successor in the Throne, and be of his Mother's Religion, and so undo all, as in the issue all came so to pass. To prevent this, nevertheless, they fancy a new conceit, that Laws made by *English Kings* in their *minority*, are less considerately done, than being made in riper years. And so by that one opinion, countenanced a worse; which was, that the *Legislative Power* depended more upon the judgment of the King than the debates and results of the Parliament: a notion that would down exceeding well with Kings, especially with such an all-sufficient Prince as *Henry the Eighth* conceived himself to be. Upon this ground a Law is made, to enable such of the King's Successors, by him appointed, as shall be under the age of Twenty and four years when Laws by him are made, to annul the same ^{28 H. 8. c. 17.} by Letters-patent, after such Prince shall attain the said age of Twenty four years. Thus the Arms of the Parliament are bound from settling any Reformation, let them intend it never so much; a Meuse is left open for the *Romish Religion* still to get in, when the Season proves more fair. The Parliament was now in its *minority*, and gives occasion to the Reader to bewail the infirmities of the excellency of *England*.

A fourth advance of Prerogative, concerned the Executive Power in the Government of the Church. This had formerly much rested in the Prelacy, and that upon the chief *Prælatissimo* at *Rome*; now there is found in *England* a greater Prelate than he; the Pope was already beheaded, and his head set upon the King's Shoulders: To him it is given to nominate all Bishops and Archbishops within his Dominions by ^{25 H. 8. c. 20.} Conge d'eslire; and that the party once elected shall swear Fealty, and then shall be consecrated by Commission and invested: but if upon the Conge d'eslire no Election be certified within Twelve days, the King shall by Commission cause his own Clerk to be consecrated and invested. The occasion that first brought in this Precedent, was the access of *Cranmer* to the See at *Canterbury*; for though the Headship had been already by the space of two years translated from *Rome* to *England*, yet the course of *Episcopizing* continued the same as formerly it had been. I mean, as touching the point of *Election*: For though in their Original, Bishops were meerly Donatives from the Crown, being invested by delivery of the Ring and Pastoral Staff; ^{17 Joh. 35 E. 1. St. Carl.} and until King *John's* time, the Canonical way of *Election* was disallowed; yet King *John* by his Charter, *de communi consensu Baronum* granted that they should ^{25 E. 3. De provis. 13 R. 2. c. 2.} be eligible; which also was confirmed by divers publick Acts of Parliament in after-times, and now by this Law last recited; and with this way the King was contented for the space of six years: for the Reformation intended by the King, was not done at once, but by degrees; and therefore tho' this course of *Conge d'eslire* was brought into use; yet the Parliament being of Six years continuance, (a necessary thing in times of so great change of Policy) began this course of *Election*, by giving ^{Antiq. Brit. vit. Cranmer.} the King power to nominate, and allowing of the Pope power to grant to such his Bulls or Pall at his own will; otherwise they should be consecrated by Commission without

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without his consent. And thus at the first the Pope's Concurrence was not excluded, though his Negative was. In this posture of affairs, comes *Cranmer* to be consecrated Archbishop. And being nominated thereunto by the King, the wily *Pope* knowing the King's aim, meant not to withstand, lest he should lose all, but granted the *Pall* as readily as it was desired; so as *Cranmer* is thus far Archbishop of *Canterbury* without all exception: yet he must go one step farther, and take the old Oath to the *Pope*; which the King allowed him to do, *pro more*; and which he did, *renitente Conscientia*, say some, and with a *Salvo*, say others; and all affirm it was done *perfunctorie*, like some worn Ceremony, or civil Compliment. Nevertheless it was not so soon turned over; the Archbishop loved not the Office, the King loved not Partnership in this matter; and it was evident to all, that no man could serve these two Masters any longer: an agreement is soon concluded in Parliament to exclude the *Pope's* Power quite out of this game, and all is left to be done by the King and his Commissioners, by the Law formerly propounded. In all this, the *Pope* is loser, the *English Clergy* the savers; for the *Pall* cost *Cranmer* nine hundred Marks: And the *Crown* is the great gainer; for hereby the King got the men sure to him, not only by their own acknowledgment and submission, but also by a *Statute-Law*.

And lastly by *Oath*, which to make sure, was treble twined; once upon their first submission, in the King's twenty second year, when they had been under *Præmuniri*.

Secondly, Soon after decease of *Queen Katherine* Dowager, in the twenty sixth year; which *Oath* was more compleat than the former, containing,

First, *A Renunciation of all Fealty to the Pope, or any Foreign Power.*

Secondly, *An Obligation to adhere to the Cause of the King and his Successors.*

Thirdly, *A Disavowing of the Pope, otherwise than as another Bishop or fellow-brother.*

Fourthly, *An Engagement to observe all Laws already established against the Pope's power.*

Fifthly, *A Disavowing of all Appeals to Rome.*

Sixthly, *An Engagement to inform the King of all Messages or Bulls, sent from Rome into England.*

Seventhly, *An Engagement to send, or be privy to the sending of any Message to Rome for any such purpose.*

The third *Oath* was that of *Fealty*; which anciently was due to Kings, and now revived, to be taken by all Bishops upon their admission. And thus the *English Prelacy*, having been sworn Slaves to the Papacy ever since *Becket's* time, are now preferred to a more Royal Service; and the pursuit by Kings after their right, being laid aside by the space of 300 Years, is now renewed, and the prey seized upon by the Lion; who found it upon a better Title, and in better condition by much, than when at the first it was lost: For it was upon some semblance of Reason, that the Archbishop and Clergy gained it; but being afterwards dispossessed thereof by the *Pope*, and yet without any other shadow of Title, but the power of his own gripe, for the present he is the *Occupant*, and becomes Proprietor by prescription: till now the *Felon* being apprehended, the stolen Goods are the King's in Right, and by *Remitter*; whereunto the Parliament by the Statute adding their Conveyance, establishes the same by an unquestionable Title. Nevertheless the service

is no less servile to the Crown, than it had been to the *Romish* Mitre; formerly they asserted the Pope's *Infallibility*, now the King's *Supremacy*. They are now called by the King, made by the King, sent by the King, maintained by the King; whatsoever they are, whatsoever they have, all is the King's. He makes Bishops; he makes new Bishopricks, and divides or compounds the old as he pleaseth, by a power given to *Henry* the Eighth by Parliament. Which *Oath* was never in any Prince before or after him, that I can find; so as the Crown had it not, but the man, and it died with him. 31 H. 8. c. 9.

The King thus loaden with Power and Honour above all his Predecessors, (if without proportionable Maintenance to support the one, and act the other) must needs consume himself (as one in a Tympany) by growing great. For though he was left rich by his Father's Treasure, yet his Zeal to *Rome* in its now poor captivated condition under the Imperial power, stirring up in him great Undertakings abroad (besides his own Pleasures and Gallantry at home) exhausted that; and doubtless had starved these his grand designs, had he not found the hidden Treasures of the Cells and Monasteries; the sight whereof so roused up his Spirits, that he adventured upon the purchase; though he knew difficulties enough to have stopped his undertakings, if he had not resolved both against fear and flattery. It was not done without deliberation; for the thing was felt as a grievance before the *Norman* times, and complained of in Parliament above a hundred and forty years ago, and divers times since; but Kings either understood not, or believed not, or durst not give remedy, or had much else to do. But now the King is beyond all his Predecessors; he knows much, dares do more, and is at leisure. He will go as far as Emperor or *French* King, and beyond them also; but would not try masteries with either, for they were all Cocks of the game.

The first occasion that discovered the work feasible, was a precedent made by Cardinal *Wolfey*, whose power was enough to dissolve some petty Cells, and no opposition made. The King might well expect the work would be as lawful for him, and not much more difficult; or if any Storms ensued, the people that had so long complained, and felt the burden of these excrescences of the *Clergy*, would soon find out a way to calm them: the King need do no more than speak, and the people will do. This opened the door; but that which brought the King in, was the hold the Pope had in this Kingdom by these Cloistered people, who were persons dead in Law, and dead to all Law but the *Canon*. And upon this account the King's Ancestors had possessed themselves of the Cells, in the hands of Foreigners, in times of War; and now a deadly feud is stirred between *Henry* the Eighth and the Pope their holy Father. The Children cannot expect to thrive, whenastheir Father is cast out of doors; and so all must out together. Yet the manner is observable, they must not be cast out, but must go out: the inferior and greater part are *dead persons*, have learnt obedience; they can neither bark nor bite, and therefore they may sleep; and what is done, must be done with such of them as are alive. Upon a Visitation, these are brought under the *Test*, and found in such a condition, that they had better give way, and voluntarily surrender, than abide the Trial. Once more the smallest are picked out, whilst the greater stand by and wonder; but either do not foresee, or (in despair of alter-27 H. 8. c.

1 H. 8. c. 13. ing the King's Resolution) do nothing but expect the sad hour, which within four years comes upon them all, every one of them chusing rather to surrender, and expect the King's Mercy for maintenance during life, than adventure against the dint of his Justice and Power, and so lose all; for they were all ill befriended amongst all sorts of the people. Thus came the personal Estate and Stock of these Houses to the King's immediate Treasury, and their yearly maintenance to the disposing of the Crown. Which might have advanced the same well-nigh to the value of Two hundred thousand pounds yearly, but that the King intended to let the people enjoy the fat as well as he, that they might be mutually engaged to maintain hold of the Prey that they had jointly gotten. Out of all which nevertheless the Crown had a small rent, or service annual, for the acknowledgement of their Tenure; besides the First-fruits of Spiritual Dignities, and the Tenth; both which he formerly had already obtained.

Fox Mart.
fol. 322.

The first whereof was but casual, and occasional in the payment, arising only at the entrance of the party into his Promotion; and which was gained by the Pope from *Edward* the First; although at his Parliament at *Carlisle*, in his thirty fourth year, he withstood the same. This was above Three hundred and twenty thousand pounds in the whole sum. The latter was annual, and amounted to above Thirty thousand pounds. And thus the Pope's Usurpations are turned into duties to the Crown; but were much lessened, in regard that these Cells and Monasteries were accounted amongst these Ecclesiastical Promotions, which by their dissolution fell off in that account. Nevertheless, the advancement that might by a parsimonious King have been made of the fall of this Cedar, was such, that the Crown might have been rendred of it self absolute and all-sufficient. But *Henry* the Eighth was not thus minded; the Affairs of *Europe* were gotten into a high pitch; Princes generally over-active; *Henry* the Eighth inferiour to none of them; what comes in, goes out; and he is a rare example of that divine Proverb, *As Riches increase, so do the Mouths of them that eat*; he still stands in need of his people's Love, Purse and Power. So Divine Providence orders the matter, that Kings can never attain further end of their undertakings without the aid of the people than their labour, lest they should be too big to be Christians, and the people thought too mean to be Men.

C H A P. XXVIII.

Of the Condition of the Parliament in these Times.

THEY are no good Expositors, that consider their Text by piece-meal only; nor they good Historians, that will tell you the bare Journal of Action, without the Series of Occasion. Such as these will speak much of the Actions of *Henry* the Eighth, what advancement he brought to the Crown; and made a compleat Monarchy, wherein the King may act what he resolveth, resolve what he pleased, and please what he lusteth; whenas in truth the thing is nothing so: For though many of his actions, in relation to particular persons, cannot be justified by any Law; so in truth did they never proceed from any Law, but meerly from

from the passion or will of the man, and connivance of the people, who could bear that from this King, that their Ancestors would never endure under any other. And yet in all the grand concerns of the Nation, the Law kept still upon the top; nor did the King enter into any competition therewith, or lead the way thereunto, other than by especial allowance of the Parliament.

For *First*, it is evident, though the King was supreme Head of the Church; yet this was not like the head of a mad-man, led by phancy, without the Law of reason, or reason of Law: But it was defined, circumscribed, and formed thereby, with Qualifications and Limitations, as hath been already expressed in the former Chapter.

Secondly, It is no less clear, that the *Legislative Power* rested in the Parliament, and not in the King, when he was in his greatest height. For as *Head of the Church*, he had no such power in Church-matters; or if he had such a right, it was taken away by the Acts of Parliament. Nay, when the Pope was yet possessed of this *Headship*, the Parliament did determine the manner of the Worship of God, in some particular cases; as in the keeping of the *Lord's Day*, the Statute ^{4 Edw. 4.} of *Edward the Fourth*, to the *Honour of God*, did provide for the observing thereof; and to the *Honour of God*, it was taken away by a Statute in the time of *Henry the Eighth*, if the words of either Statute may be believed. But more ^{15 H. 8. c. 9.} especially, after that this *Headship* was translated to the King, the Parliament ^{25 H. 8. c. 19.} provided, that the Canons should be examined and allowed by the King, and Thirty two persons, one part of the Clergy, and the other of the Temporality, chosen by the King. And those that shall be assented unto, and confirmed by the King, and the Thirty two persons, or the Major-part of them, shall be obeyed, and put in execution; the residue shall be void: *Provided nothing shall be done against the King's Prerogative, or the Laws and Customs of this Realm.* So as the King had much, but he had not all; and what he had, the Parliament gave him by a Law, ^{27 H. 8. c. 15.} that was executory all the days of *Henry Eight*, by divers continuances; and was ^{35 H. 8. c. 16.} not any power devolved to the Crown under the Title of *Supremacy*, nor by virtue of the Act of Parliament concerning it; but by the continual influence from the Parliament upon the Crown, as well before that Act as after, derived upon it. This King hath then this right of *Law-making*, but it is with the Thirty two he hath it, but not his *Successors*.

And *lastly*, he hath it but by a derivative power from the Parliament, and a Committee for that service. And in a word, *he hath the Power, but the Parliament hath still the Law of that power.*

The second Privilege of the Parliament hitherto, concerneth only Laws concerning Church-Government. In the next place cometh to be considered the Legislative power in point of *Doctrine*; which doubtless issueth from the same principle of Power with the former. For if the Church (which as a pillar and ground holdeth forth the Truth) be the *company of professing Believers*; then ought it not to seem strange, if these in their representative do intermeddle with this Power, or rather duty. And for the matter in fact, neither did the King challenge this Power, nor did the Parliament make any difficulty of Conscience in executing the same; and yet there were many Learned and Conscientious Men of that number.

They therefore, as touching the *Doctrine*, proceed in the same way with that

that formerly mentioned concerning the Discipline: And a Committee also is by them made of the King and Learned Men, to set down rules for Faith and Obedience, and for the order of the publick Worship of God, according to the Word of God. And these rules are confirmed by a Statute, so as the King hath a power in the point of *Doctrine*, but it is a derivative power; it is a limited power to himself, and not to his Successors; and to himself, and others joined with him.

And lastly, nothing must be done contrary to the Laws of the Kingdom.

Secondly, The Parliament hath not only a right to grant and limit this power unto others, but also to execute the same immediately by it self. And therefore before they granted this power to this *Committee*, (whereas formerly the Pope usurped the power to be the *Omega* to the resolves of all Councils) the Parliament intercepted that to their own Jurisdiction, in flat opposition to the Infallibility of the *Roman Chair*, so far as to *disherize* some Opinions, which, by the sentence of that infalible mouth, had been marked with that black brand of *Heresy*. And what they did before this Act of Delegation to the King, and other Committees for this work, they did afterwards, as not concluding their own power by any thing they had so done; as may appear, by their Censure of the *Translation* of the Bible made by *Tindal*: By their establishing another *Translation*: By their ordering and appointing what persons might read the same: By their qualifying the *fix Articles*; and the like. The Parliament then hath a power which they may grant, and yet grant nothing away; they may limit this power in others as they will, and yet not conclude themselves. And the King by accepting this limited power, must disclaim both the original and absolute Right, and cannot claim the same by right of *Headship* or Supremacy. This was one great Windfall which the Parliament had from the ruins of *Rome*, not by way of Usurpation, but *re-seizure*: For their possession was ancient; and though they had been dispossessed, yet that possession was ever under a continual claim, and so the right was saved.

A second, that was no less fatal unto that See, was the loss of all power over Ecclesiastical Persons in this Kingdom. For whereas the Popedom had doubly rooted itself in this Nation, one way by the *Regulars*, the other by the *Seculars*; the Parliament by the dissolutions of Monasteries, &c. consumed the one to ashes; and by breaking the *Faith* between the other and the Pope, parted the other's root and the stock asunder: and thence ensued the down-fall of this tall Cedar in this Nation; and Prelacy now left alone, must fawn elsewhere, or lie along; a posture wherein that rank of men can never thrive. Therefore up again they peep, and espying a King that loved to tour aloft, they suddenly catch hold, promising their help to maintain his flight; and so are carried up, and like a Cloud borne between Heaven and Earth, making the *Commons* beholden to them for the King's Sunshine, and the King for his interests in the people. and for his superlative advancement above them all. Now though the *English* Prelates may think their Orb above the Winds, yet were they herein deceived. The *Parliament* had power in their *Election*, before the Pope usurped that to himself: now that they are discharged thereof, Kings are possessed of them by *Conge d'eslire*; but it is not by way of restitution: For Kings were never absolutely possessed of any such power, but as *Committees* of Parliament, and by delegation and concession from them; and therefore [the Clergy] must render an account to them, and abide their judgment when they are thereto called.

Thirdly,

Thirdly, The Parliament had the disposing and ordering of all the Church-Revenues, as the Laws concerning *Monasteries, Sanctuaries, Mortuaries, First-fruits, Tenths, Annates*, and such-like, sufficiently manifest.

Fourthly, The Parliament had the power of granting *Licences, Dispensations, and Faculties*; setting a Rule thereunto, as in case of *Non-residency*; and delegating the power to Committees; whereof see more in the Chapter following, concerning ordinary Jurisdiction. ^{21 H. 8. c. 13.}

Fifthly, The Parliament reserved the Cognizance of all Appeals for final Sentence unto themselves, and disposed of all the steps thereunto, as unto them seemed most convenient. For though it be true, in some cases the Archbishop of *Canterbury* had the definitive Sentence, and in other cases the Convocation; yet was this but by a temporary Law, and this also granted to them by the Parliament; which took it away from the Pope, and never interested the Crown therein, but made the Archbishop and the Convocation their immediate *Delegates* so long as they saw good. Afterwards, when they had done their work, viz. The determining the *Appeal* and Divorce of Queen *Katherine*, and some other matters, the same hand that gave that power, took it away, and gave it (not to the King or Crown) but to *Delegates* from the Parliament from time to time to be nominated by the King; and may as well alter the same, and settle the power elsewhere, when they please. And therefore after the *Appeal* of the Dowager thus determined, and the Sentence definitive thus settled upon *Delegates*; the Parliament nevertheless determined the other Causes of the Marriages of the Lady *Anne Bullen*, and the Lady *Anne* of Cleve, the jurisdiction of the Crown never intermeddling therein. So as upon the whole, it must be acknowledged, that however the King was *Supreme Head of Causes Ecclesiastical*, yet had he not the definitive Sentence in *Appeal*, nor *absolute Supremacy*, but that the same was left to the Parliament. ^{25 H. 8. c. 19.}

Sixthly and lastly, what attempts the Parliament had met with; partly from the designs of some great men that sought their own ends, and partly from the endeavours of these Kings that sought their own height and greatness above their people's good, hath been already related: and the utmost issue hath been truly stated, viz. *That the gains have come to the Kings persons, and not to their Crown; and that therein they have put their Seal to the Law, and made their submission to the Parliament, as touching both their persons and power.* Add hereunto, that however *Henry* the Eighth aimed much at himself in his ends, in two other main interests that most nighly concerned him; yet the chief gain came to the Parliament.

The one concerned his own *Wife*; which however so nighly related to him, as next to his own person, and under the determination of the immediate Law of God; yet was so cast upon their Sentence, as if he durst adventure his own Soul at their direction.

The other concerned the *Crown*, to which he ought relation above his own power; which he laid down at the feet of the Parliament, seeking to their power, to fulfil his own pleasure. The Ball is tossed up and down, sometimes amongst the issue between the King and the Lady *Anne Bullen*, another while amongst the issue between him and the Lady *Jane Seymour*, or such as the King should nominate by Letters-Patent or last Will. After that, to the Ladies *Mary* and *Elizabeth*, to perform conditions declared by the King's Letters-Patent, or his last Will. The King ^{25 H. 8. c. 22. 28 H. 8. c. 27. 35 H. 8. c. 1.}

King then is trusted, but he hath his trust from the Parliament; the Crown is in-tail'd, (as it hath been ever since *Richard the Second's* time) but it is done by Parliament. The reversion is in *the Clouds*, but the *right of Inheritance* much more. The Conclusion of all this, The Parliament by serving these Kings turns, turned their turns into their own.

C H A P. XXIX.

Of the Power of the Clergy in their Convocation.*

* Vid. ante
chap. 6, &
17.

THE Convocation of the Clergy, like some froward Children, loves not new dressing, though it be a gainer thereby. Before the Pope and *Henry the Eighth* were fallen asunder, their masters, their minds, their work, all was double; their Counsels uncertain, their Conclusions slow in Production, and slight in their Fruit and Consequence; sometimes displeasing to the Pope, sometimes to the King, generally to themselves. Who naturally lingering after their own interests, were compelled to feed that body that breathed in them, rather than that wherein themselves breathed; and so like hunted Squirrels, from bough to bough, were ever well tired, yet hardly escaped with their own Skins in the conclusion. Now *Henry the Eighth* renders them better conditions, both for Ease and Honour, and more suitable to their own Interest; yet they are loth to accept, because they had been *Slaves by Prescription*.

25 H. 8. c.
19.

Formerly they were troubled with multiplicity of *Summons*, sometimes from the King, sometimes from the Pope, sometimes from the Metropolitan, and always over-dripped by a Foreign Power, that they could propound nothing for the good of the Souls of themselves or others, but must be blasted from without; their labours lost, their undertakings vain, and themselves, in the conclusion, sit down choaked in their Consciences and Desires. Now they are at no man's call but the King's, and that by *Writ*; *Provincial*, and *Legate à Latere*, must meddle no more.

21 E. 4. fol.
46.

Formerly, it is taken for granted, that Kings have no Vote in matters Ecclesiastical, though themselves be interested therein; and therefore if he will accept of a *Disne*, he must accept it *Statu quo*, it is granted; nor can he interpose his *Dissent*; nor do they much care for his *Consent*: But whether the King be concerned or not concerned, what they conclude they must maintain, *Vi & Clavibus*, although in right his Prerogative is above theirs. Now by the Statute, the King's Vote is asserted, and a Negative Vote restored, and himself made as well *Head* of the Convocation, as the Church. Nothing can pass there without his concurrence, nor come to the consideration of the Parliament without his pleasure; and thus the King hath a double Vote in every Church-Ordinance: One as in the Parliament, to pass the same as an Act of Parliament, of which I conceive the Opinion of the Honourable Judge is to be understood; the other, as a Member of the Convocation, to pass their advices to the Parliament: and therefore he might either sit in person amongst them, or by his Vicar, as *Henry the Eighth* did by the Lord *Cromwell*. By the first, the whole Kingdom was engaged; By the second, the Convocation only, and that as a Court only, and not the representative of the Clergy; because as they had a Spiritual relation, so also they had the common

25 H. 8. c.
19.

Instit. 4. fol.
923.

Right of *Free-men*, and therefore could not be bound without the Common Consent of the *Free-men*.

Thirdly, As their power of Convention, and power in Vote, so their original Right of the *Law-making* suffered a change. Formerly they depended wholly upon a *divine Right*, which some settled originally in the Pope, others in the Prelacy, and some in the Clergy. But now they sit by a *derivative Power* from the Act of Parliament, from which, as from their head, they receive life and power.

Fourthly, They suffered some change in the very work of their *Convention*; for though formerly they claimed power to meddle only with Ecclesiastical matters, yet that notion was ambiguous, and they could many times explicate it more largely than naturally. It is not to be denied, but the matters concerning the Service and Worship of God, are of Spiritual consideration; but that such should be so strictly deemed to lie in the way of Church-men only, is to bring all Spirits within the Verge of Ecclesiastical Jurisdiction, and to leave the Civil Power to rule only dead Carcasses: Much less can any other thing, which by prescription hath not been of Ecclesiastical Cognizance, be called Spiritual.

But to come to particulars, because generals edify not. The *Convocation* claimed formerly power, as originally from it self, to impose Rules for Government upon Churchmen, and Church-Officers; and upon the Laity, so far as extended to their Service of God: And also to charge the Estates of the Clergy; and concerning Matrimonial and Testamentary Causes. They claimed also a power to determine Doctrines and Heresies. Yet *de facto*, divers of these they never acted in that right wherein they claimed to hold Cognizance.

First, As touching the charging of the Estates of the Clergy. If it was for the King's Service, they were ever summoned by the King's Writ; yet was not their act binding immediately upon the passing of the Vote, till the Parliament confirmed the same; and therefore the old form of granting of *Dismes*, was, *Per Clerum & Communitatem*, as by the pleading in the Abbot of *Waltham's* Case appears. For without their concurrence they had no power to charge any *Free-man*, nor to levy the same, but by their Church-Censures, which would stand them in no stead. And in this, the *Convocation* suffered no alteration, either in Right or Power, by the change thus wrought by Henry the Eighth.

Secondly, As touching imposing Laws upon the Laity in points of Worship and Doctrine, it is evident, though they claimed such power, they had it not. For when all is done, they were contented at length to get the support of the Statute-Laws of this Kingdom, as may appear in the particular Laws concerning the *Lord's-day*, and proceedings against *Hereticks*, settling the Popedom in the time of the great Schism, &c. But now all Title of claim is quite taken from them, and all is left in the supreme Legislative Power of this Nation, as formerly hath been already manifested.

Thirdly, As touching *Matrimonial* Causes, their former power of making Laws concerning them, and *Testamentary* Causes, is now absolutely taken away; only concerning *Matrimonial* matters, they had so much of the Judicatory power

24 H. 8. c.
12.

concerning the same put upon them, as might well serve the King's own turn; and that was for determining the matter between himself and the Lady Katherine Dowager, depending before the Archbishop Cranmer. For the King supposed the Pope a Party, and therefore meant not that he should be his Judge. And thus, though the Clergy had acknowledged the King to be their *Supreme Head*; yet in this he was content to acknowledge their *Supremacy* above him; to judge between himself and his Queen, and in other matters concerning himself. So as upon the whole matter, the *Convocation* were gainers in some things; in other things, they were only losers of that which was none of their own.

C H A P. XXX.

• Vide ante
c. 6, & 17.

Of the Power of the Clergy in their Ordinary Jurisdiction *.

28 H. 8. c.
12.

THOSE Spirits are truly degenerate, that being sensible of misery, cannot stir up desires of Change, although the way thereto lies open before them: And this shews the nature of the *Romish Yoke*, that it lay upon the Spirits of men, did intoxicate, and make them drunk with their condition. Otherwise, the Usurpations, Oppressions, Extortions and Incroachments of the Popedom upon the Bishops Sphere, and the people under their charge, could never have provoked such complainings amongst all sorts, in several ages from time to time, [without Redress.] And now that Henry the Eighth undertakes to set them free, so as they would acknowledge his *Supremacy*, they all are struck dumb, till a *Præmunire* taught them to speak; and so were scared into a better condition than they would have had, and into a more absolute Estate of Jurisdiction than they received from their Predecessors. The Pope had now usurped a power *supra-ordinary* over all Appeals, gained the definitive Sentence to the *Roman See*, and had holden this power by the space of four hundred years; and the King finding the root of all the mischief to his Crown from abroad, springing from that Principle, meant not to dispute the point with the Casuists, but by one Statute took away all Appeals to Rome; and determined Appeals from the Bishops Court, in the Archbishop's Court; and the Appeals from the Archbishop's Commissary, in the Court of Audience. So as though in the King's own Case, the Convocation had the last blow; yet in matters concerning the Subjects, the Archbishop was either more worthy, or more willing to have that trust. For though the Convocation might have determined all, as well as the Pope; yet for dispatch sake of a multitude of Appeals now depending at Rome, and to prevent long attendance on the Convocation, that now had much to do in matters of more publick nature, the utmost Appeal in such cases is made Provincial. This (whether privilege or prejudice) the Ecclesiastical Causes gained above the Civil, whose definitive Sentence was reserved to the Parliament. And thus is the Archbishop made Heir to the Pope, in the greatest privilege of a Pope; to be chief Judge on Earth in matters Ecclesiastical, within his own Province. A trick that in my opinion much darkened the Glory of the King's Title of *Supreme Head*, which the Churchmen had formerly offered up to the honour of the Crown of this Realm. For be it so, that the Title is in the Crown by *Remitter*; yet cannot the same carry along

along with it any more than a lawful power, and whether all the Pope's former power allowed him by the Canon, or gained by Usurpation and Custom, shall be said a lawful power, or whether the power of *Review by Appeal*, shall be derived to the Crown, under the general Notion of *Supremacy* upon the Clergy's submission, is to me a doubt (albeit, *I must give honour to the Judgment in Print*) in regard that after the submission of the Clergy, the matter concerning the Divorce of the Lady *Katherine Dowager* came before the Pope by *Appeal*, and there depended, the King himself also waiting upon that See for Justice, and a definitive Sentence in that matter; and thereby acknowledged the Pope's power *de facto*: Notwithstanding the Clergy's foregoing submission; and being occasioned by the delay at *Rome*, he procured this Statute concerning *Appeals* to be made; whereby at one breath he took the *Appeals* to *Rome* away, and settled them as formerly hath been mentioned; all which was done two years before the Title of *Supremacy* was annexed, or declared for, to be to the Crown by Act of Parliament. Inst. 4 fol. 344.

And therefore, as to me it appears, the power of *Supreme Cognizance of Appeals* was not in actual possession of the Crown by the Clergy's submission; so was it actually vested in the Archbishop, before the Title of *Supremacy* was confirmed by Act of Parliament; and so it never was in the Crown actually possessed, much less had the Crown the same by *Remitter*. For the King's turn once served by the Convocation, and the matter of the Divorce of Queen *Katherine* settled, the King perceiving the slow progress of the *Convocation*, the Members of the same not being yet sufficiently tuned to the present Affairs: And moderate Archbishop *Cranmer* likewise foreseeing, that the *Odium* of these Definitive Sentences would be too great for him to bear; another *Appeal* is provided, more for the honour of the Crown; to be from the Archbishop to *Delegates*, to be appointed by the King, his Heirs and Successors; so as though their Nomination be the King's, yet their power is deduced immediately from the *Parliament*, which took the same from the Archbishop, and conferred it upon them.

A second advantage not inferiour hereto, which the Archbishop gained out of the ruins of the Popedom, was the power of *Licences* and *Dispensations*, or *Fa-* 25 H. 8. c.
culties. In the Pope, it was a transcendent power without any rule, but what ¹⁹ was tuned to him by the Bird in his own breast; and was the ground of much *licence*, or rather *licenciousness* in the world: But in the Archbishop, they seem to be regulated.

To be First, *In Causes not repugnant to the Law of God.*

Secondly, *Such as are necessary for the Honour and Security of the King.*

Thirdly, *Such as were formerly wont to be remedied at the See of Rome*; yet in ^{21.} truth left as much scope for the Conscience of the Archbishop to walk in, as the Pope had in former times. A large Teather, and greater privilege than ever the Crown had; by which, although the King himself be like *Saul*, higher by the Head than all the people, yet in many things *Samuel* is higher than he. The moving cause hereof is not difficult to find out: the King had but lately married the Lady *Anne Bullen*; a thing that many startled at, and the King himself not extreemly resolved in; he would therefore have his way like that of the Zodiack, broad enough for Planetary motion of any one that could not contain himself within the

Ecliptick Line of the Law, and so shipped over the Pope's power to the Chair of Canterbury, and had made a Pope instead of an Archbishop, but that the man was not made for that purpose. What the Ordinary Jurisdiction got or lost, we come in the next place to observe.

First, they had still their *Courts* and Judicatory power, but upon what right may be doubted. Their first foundation was laid by the Civil Power of a Law, in the time of *William* the first *Norman* King; yet the power of the Pope and Bishop growing up together, they came to hold the power of the Keys by a *Divine Right*, and so continued, until these times of *Henry* the Eighth, wherein they have a *Retrospect* to the Rock, from whence they were first hewn; and many seem to change their Tenure, and therewith therefore are in right to change the Stile of their Courts, and Title of Summons; but the times not being very curious, and the work of reformation but in *fieri*; the more exact Lineaments must be left to time to finish and beautify. A greater blow did light upon the Law of these Courts, which was left as doubtful as the Canons; all which are now put to the question, and to this day never received full resolution, but were left to the Parliament to determine them at leisure; and in the mean time to the Judges of the Common Law, to determine the same Lawful or Unlawful, as occasion should require. Nevertheless, the *Courts* still hold on their course, according to their old Laws and Customs, for their form of Proceedings; some say by *Prescription*, yet more rightly by *Permission*; it being a difficult matter to make *Prescription* hold against a Statute-Law. As touching the matters within their Cognizance, the Law settled some, and unsettled others.

First, As touching *Herefy*, the Church-men formerly thought scorn the *Lay-Magistrate* should intermeddle; but not being able to stop the growth thereof by their Church-Censures prayed aid of the Civil Magistracy; so by degrees arose the penalties of Imprisonment and Burning, which brought the whole matter into Cognizance before the Civil Magistrate, because *no Free-man might be proceeded against for loss of Life or Liberty, but by the Laws of the Nation*; and for this cause the Civil Magistrate granted the Writ of *Habeas Corpus*, and relieved many times the party imprisoned wrongfully, or granted *Prohibition* as they saw cause. And therefore it cannot be said rightly, that the sole or supreme Cognizance of this crime of *Herefy* belonged to the Clergy before these times. Nor did their proceeding upon the Writ of *Burning* warrant any such thing; partly because till these times the Canon-Law was the best ground that these proceedings had, and the course therein was not so uniform as to permit the Title of a Custom, to warrant the same: *Conviction* being sometimes by Jury, sometimes according to the Canon, sometimes before the Ordinary, sometimes before the Convocation, sometimes before the King, sometimes before special *Delegates*, as the Histories of the Martyrs more particularly set forth, and no Act of Parliament positive in the point. But the time is now come, when nighest Reformation, that the thing is settled more to the prejudice of Reformation than all the endeavours foregoing; like to the darkness of the Night, that is at the Superlative degree when nighest break of Day. A Statute is now made, that indeed quite blotted out the very name of the Statute

Statute of Henry the Fourth, *De Hæretico comburendo*, but made compleat that Statute of 5 Rich. 2. and the other of 2 Hen. 5. both which were formerly neither good in Law, nor effectual, otherways than by Power; and gave more settlement to the Ordinary's proceedings in such Cases. For the Delinquent might be convicted before the Ordinary by Witnesses, or might be indicted at the Common Law, and the Indictment certified to the Ordinary as Evidence. Yet did the Parliament carve them out their work, and in exprefs words declared; *That Opinions against the Authority and Laws of the Bishop of Rome were not Heresy*; and by the same reason might have done more of that kind, but that was enough to tell all the world, that the Parliament could define what was not *Heresy*, although they did not then determine what was *Heresy*. And thus the judgment of the *Romish* Church is called into question, in one of their Fundamentals, and the Clergy left in a muse concerning the rule upon which they were to proceed against this crime.

The Parliament, within six years after, undertakes, though somewhat unhappily, to determine and define certain points of Controversy, which had some relation to the Worship of God, and the publick Peace, and declared the contrary to these determinations to be *Heresy*, and the punishment to be Death and Forfeiture, and the Trial to be before Commissioners by Jury or Testimony of two Witnesses, or by examination in the Ecclesiastical Court, or Inquisition in the Leet, or Sessions of the Peace. Upon the whole matter therefore the Ordinary had a particular Power to determine *Heresy*; but the Parliament determined such *Heresies* as were punishable with *Death and Forfeiture*, by enumeration in the *six Articles*. This was the Clergy's Primmer, wherein they imployed their study, as making most for their design, and laid aside thoughts of all other *Heresies* as dry notions, or old fashions laid aside, and not worthy the setting forth to the common sale.

Secondly, The Lesson concerning *Marriage* was no less difficult for the Clergy to take out. They were put by their former Authority derived from abroad, and their ancient Rule of the Canon-Law. With the King's leave they do what they do, and where they doubt they take his Commission. So did the Archbishop of *Durham* in the Case between *John and Jane Fisher*: In the King's Case, the determining part is put to the Parliament's conclusion; and for a rule in other cases, some persons are enabled to marry, which formerly were not, viz. Masters of the Chancery, and Doctors of the Civil Law; and some forbidden Marriage, as all Priests, by the Statute of the *six Articles*. And unto the rest concerning degrees of Consanguinity, or Affinity, a particular enumeration is appointed to be observed, within which *Marriage* is declared unlawful, all other further off are made lawful. In all which regards the Cognizance of *Matrimonial Causes* is theirs only by leave, [from the Parliament.]

Thirdly, *Residency*, and Non-residency, was a Theme formerly learned from the Canon Law, in which, as also in the thing it self, the Clergy were the only skilful men. The rule of the Canon Law was strict enough, considering the times, but it was not steel to the back. The Parliament now undertakes the Cause; and though it gave, in some respects, more liberty than the Canon, yet stood it better to its tackling, and kept a stricter hand upon the reins, than was formerly used; and by giving a general rule for *Dispensation*, took away all arbitrary *Dispensations*

21 H. 8. c. 13. and *Licences*, which were formerly granted beyond all rule, but that of Silver or Gold; and made all practices contrary to the rule, damageable to the party. Thus far concerning the matters in Cognizance; now touching the *power of the Keys*. *English Prelacy* having laid aside the pretensions of *Rome*, they put the world to a gaze, to see which way they would go. In the innocent infancy of *Prelacy*, it was led by the hand by the *Presbytery*, and would do nothing without them; afterwards, having gained some degree of height and strength, they entred themselves to be Chariot-horses to the *Roman Sun*, till they had set all on fire. Now unharnessed, it is expected they should return to their former Wits; nevertheless forgetting their ancient Yoke-fellows, the *rural Presbyters*, they stable with the King; use his name sometimes, but more often their own; serving him with *Supremacy*, as he them with authority beyond their Sphere. They raise him above the Parliaments, he them above Councils; so as they do what they list, let the Plebeian *Presbyter* will or nill; they are the only numeral Figures, and the other but Cyphers to make them *omnibus numeris absoluti*. Nevertheless the Canon still remains the same: *Episcopi se debent scire Presbyteros, non Dominos, nec debent in clerum dominari; Episcopus se sedente non permittat Presbyterum stare. Episcopi novint se magis consuetudine quam dispensatione Presbyteris majores*. Kings may make them *Lords*, but as *Bishops* they hold their former rank assigned by the Canon: as *Lords*, the King never gave them the *Keys*; and as *Bishops*, the Canon did not; yet as under the joint Title of *Lord-Bishops*, they hold themselves privileged to get what power they can. Two things they reach at, *viz.* The absolute power of Imprisonment, and of Excommunication in all Causes Ecclesiastical. The Common Law would never yield this; some Statutes in some Cases did pretend.

1 H. 7. c. 4. First, As touching *Imprisonment*, the Statute of *Henry the Fourth* concerning *Heresy* doth list some such power: of what force the same Statute is, hath been already observed. In case of incontinency of Churchmen, is it more directly given them by a Statute in *Henry the Seventh's* time; before which time, the Statute it self doth intimate, that an Action did lie against them for such *Imprisonment*; which Law also was made useless by another in *Henry the Eighth's* time, who gave a way to Statutes for the punishing them at the Common Law.

31 H. 8. c. 14. First, with Death, which continued for some Months; and that being found too heavy, it was punished by another Law with Forfeiture and Imprisonment. 32 H. 8. c. 10. And the same King likewise gave way to a Law for the like punishment in case of *Heresy*, by that Law that revoked the Statute of *Henry the Fourth* formerly mentioned; although till Trial, the same wasailable: And thus it continued till the time of *Edward the Sixth*.

But as touching *Excommunication*, it was to no purpose for them to struggle: the Common Law would never permit them to hold possession quietly; but did examine their Authority, granted Prohibitions, and enjoined the Ordinary to grant Absolution where it saw cause. Nevertheless in some cases *Henry the Eighth* gives way to some Statutes, to allow them this power, as in the levying of Tenths. In the next place, the *Prelacy* had not this Ecclesiastical Jurisdiction in themselves, so as to grant it to others; but the Parliament did dispose thereof, not only to Bishops, but to Chancellors, Vicars-general, Commissaries, being Doctors of the Law, and not within holy Orders,

ders, and limiting their Jurisdiction in cases concerning the Papal Jurisdiction; and their manner of sending their Process and Citations to draw men from their proper Diocess, and also their inordinate Fees in *Cases Testamentary*. The *Prelates* therefore might possibly make great claim hereof; for generally they were still of the old stamp, loved to have all by *Divine Right*, and lived they cared not by what Wrong: But the *Laity* inclining too much to the *new Religion*, as then it was termed, refused to yield one foot unto their pretensions. And so like two Horses tied together by their Bits, they endeavour after several courses, ever and anon kicking one at another, yet still bestrode by a King that was jointed for the purpose: and so good a Horseman, that neither of them could unhorse him, till Death laid him on the ground. And thus was the *Roman Eagle* deplumed, every Bird had its own Feather; the great men the Honours and Privileges, the meaner men the Profits; and so an end to *Annates*, *Legatine Levies*, *Peter-pence*, *Mortuaries*, *Monasteries*, and all that Retinue; the vast expences by *Bulls*, and *Appeals* to *Rome*: Add to all, the cares, expences, and toil in attendance on the *Roman Chair*: And was the beginning of all the happiness of *England*.

C H A P. XXXI.

Of Judicature.

THESE two Kings were men of tow'ring Spirits, liked not to see others upon the Wing; in which regard it was dangerous to be great, and more safe not to be worthy of regard. Especially in the times of *Henry the Eighth*, whose motion was more eager: and there was no coming nigh to him, but for such as were of his own train, and would follow as fast as he would lead; and therefore generally the *Commons* had more cause to praise the King for his Justice, than the Nobility had*. Both the Kings loved the air of profit passing well, (but the latter was not so well breathed) and therefore had more to do with Courts which had the face of Justice, but behind were for the King's Revenue. Such were the *Court of Requests*, of mean Original, mean Education, yet by continuance attained to a high growth: The *Court of Tenths* and first-Fruits: The *Court of Surveyors*: The *Court of the Lord Steward of the Houshold*: The *Court of Commission* before the *Admiral*: The *Court of Wards*: The *Court of President of the North*: The *Prerogative-Court*: The *Court of Delegates*: The *Court of Commission of Review*; with others of more private regard: And (that which might have given the name to all the rest) the *Court of Augmentation*. Besides these, there were some in *Wales*; but that which concerned more the matter of Judicature, was the loss of that grand Liberty of that Country, formerly a Province belonging to this Nation, and now by *Henry the Eighth* incorporated into the same, and made a Member thereof, and brought under the same Fundamental Law; a work that had now been long a doing, and from the time of *Edward the Third* brought on to perfection by degrees.

First, by annexing the Tenure of the *Marches* to the Crown: Then upon occasion of the Rebellion, by loss of many of their wonted Liberties. Afterwards

Henry

Henry the Eighth defaced the bounds of divers the ancient Counties, and settled them anew, and the bounds of the *Marches* also, and appointed Pleas in Courts of Judicature to be holden in the *English* Tongue.

And last of all, re-united them again to the *English* Nation, giving them vote in Parliament, as other parcel of the *English* Dominions had. True it is, that from their first submission, even unto *Edward* the First, they were summoned unto Parliament, and had vote there; but only in order to the Interests of their own Country, now and henceforth they possess one and the same vote as *Englishmen*. Secondly, as Courts and Judicatories multiplied, so some also of those that were ancient, enlarged their Jurisdiction, especially such of them as most nighly related to Prerogative. Amongst others the Privy-Council leads the way; who now began to have too much to do in a double capacity, one at the *Council-Table*, the other at the *Star-Chamber*: For now their power began to be diversly considered. In their first capacity they had too much of the affairs of the *Common-Pleas*, in the latter they had too much of the *Crown-Pleas*; both of them serving rather to scare men from doing wrong, than to do any man right. And therefore though some men might seem to have some recompence, yet the greatest gain fell to the King and his Courtiers; and thus became *Majesty of State, or Prerogative, to be more feared and beloved*. What the power of the *Council* was formerly, hath already been manifested; that which both these conspired in, and whereby they gained more power over the people than all their Predecessors, was this, that other Kings stood too much upon their own Legs; these leaned much upon the Lords, and gained the Lords to stick close to them: and in this they had both the King's Love and the People's Leave, who now disjointed upon several Interests, especially that of Religion, must be contented to let go that which they had no heart to hold. And thus they obtained a *Judicatory Power* over the People; like that of great men whose censures are commonly above capacity, and not like to that of the *Peers*. This was begun in *Henry* the Seventh's time, who taking occasion to complain of corruption and neglect in ordinary Trials of the Common Law, gets the people to yield to the *Council*, or some of them, a power of *Oyer and Terminer*, by examination upon Bill, or information in matters concerning *Maintenance, Liveries, Retainers, Embraceries, Corruption in Sheriffs and Juries, Riots, and unlawful Assemblies*, Crimes all of them of the same blood with Rebellion, which the King as much hated as the thought of his Title to the Crown; and therefore would have it feared, as much as the punishment by such a mighty power; and a Trial of a dreadful nature could effect. A Trial, I say, wherein both the guilty and the guiltless adventure their whole Estates, against the edge of the arbitrary wills of great men of unknown Interests, in an unknown way, at unknown places; having no other assurance, how, or when to come off, but a Proclamation to tell the people, that the King above all things delighted in Justice. A bitter Pill this was for the people to swallow; yet it was so artificially composed, that at the first taste it gave a pretty relish, the King delights in Justice, the *Chancellor* hath his *Conscience*, the *Archbishop* brings Religion, the Judges bring Law; so as it is probable nothing will be done, but according to Justice, Conscience, Religion, and Law; a very fair mixture, but that there was a Treasurer in the case. Yet the success answered

Rot. Claus.
20 E. 2. M. 3.
15 E. 2. in
Dors. M. 13.

3 H. 7. c. 1.

4 H. 7. c. 12.

swered not expectation, the persons offended were many times inferiour, and their Estates not great, the offenders more mean, and of desperate fortunes; for great men were too wise to try this new way, or to taste of their entertainment. Therefore within nine Years the *Judges of Assize* are betruſted with all, and that Court ſo continued for as many years more; and then the King marked out one crime amongſt the reſt for his own tooth, belonging to the great men only; for they are only to commit the crime, and to give recompence ſuitable to the King's Appetite. It is giving of *Liveries*, and *Retainers*; a ſore evil in the eyes of a jealous King, tending to draw the inferiour ſort to honour and admire, and be of the ſuit of thoſe of greater ſort; and then beware the Crown. Theſe therefore muſt be tried before the King himſelf and his Council, that he may know whom he is to fear, and of whom to take heed. And hereupon is a ſtrange power given, ^{11 H. 7. c. 3.} to ſummon upon a meer Suspicion: To proceed, without Information: To examine the Defendant upon Oath, and make him his own accuſer: To puniſh according to diſcretion by Fine and Imprisonment. And thus the King and his Council have gotten a power under colour of *Liveries* and *Retainers*, to bring the whole Kingdom to be of their Livery, or elſe they can ſuſpect whom they pleaſe, apprehend whom they ſuſpect, put him preſently to the rack of confeſſion and ſo into Priſon, till he had ſatiſfied both diſpleaſure and jealousy, and even covetouſneſs it ſelf. Never was *England* before now in ſo low a degree of thralldom, bound under a double knot of ſelf-accuſing, and arbitrary cenſure; and this out-reached, not only in matters meerly Civil, tending to the common Peace, but was intruded alſo into matters Eccleſiaſtical in order to the peace of the Church. All bound unto the good Behaviour, both in Body and Soul, under peril of loſs of all that a man hath dear to him in this world.

The plot of all this was laid by *Henry* the Seventh, and was followed by *Henry* the Eighth, who put that into practice (which his Father had in deſign) being led thereto by ſuch a ſkilful Guide as Cardinal *Wolfey* was, who, though of mean Birth, yet of a Spirit above a King, and equal to the Popedom, ſtraining the ſtring of Prerogative to its utmoſt height, and then taught the King to play thereon; which he did after his blunt manner till his dying day. And thus though the Clergy are brought a peg lower, and the Nobility advanced higher, yet was it the policy of theſe Kings to make them all of their own Livery and Retainerſhip, to keep them in an upper region, looking on the poor *Commons* at a diſtance far below; and well it was for the *Commons* thus to be, till the Influence of theſe blazing Stars grew cooler.

C H A P. XXXII.

Of the Militia.

IT may fall within the verge of Opinion, that the guilty Title of *Henry* the Seventh to the Crown of *England*, gauged his mind with jealousy, the greateſt part of his Reign. Whether it were that he had not declared himſelf ſo fully upon his Title by his Wife, or that as yet he feared ſome unknown *Plantagenet* would ariſe and put his Crown to the queſtion. This made him ſkilful in the point

of Fortification (wherein he likewise spent the greatest part of his Reign) not so much by force of Arms (for he cared not much for that noise, well knowing that Peace is the safer condition for a King that comes in by power) but principally by way of gaining Concessions and Acknowledgement from the Subjects; a Musick that he much delighted to hear, well knowing it would conclude those amongst them that knew too much, and instruct them that knew too little; and so in time he should pass for current amongst them all. It was no hard matter for the King to accomplish this, the greater part of the Kingdom being pre-engaged unto his Title, and of them many depending upon him for livelihood, if he failed, they must look to loose all. But the present occasion urged more importantly; the Title to the Crown was already put to the question, by the pretensions of one that named himself Duke of York: And it is now high time for the Law to declare it self, to direct the people in such a Case. What shall the people do where Might overcomes Right; or if days come like those of Henry the Sixth, wherein the Subjects should be between Two Mill-stones, of one King in Title, and another King in possession, for whom must they take up Arms? If for Edward the Fourth, then are they Traitors to Henry the Sixth: If for Henry the Sixth, then are they Traitors to Edward the Fourth. And so now, if for Henry the Seventh, then they may be Traitors to the Duke of York: If for the Duke of York, then are they Traitors to Henry the Seventh. For though the Duke of York was said to be but a contrivance of the House of Burgundy, yet a great part, both of the great men and others, were of another opinion, and the King himself was not very certain of his condition for the space of six years thereby. This puts the Title of *Allegiance*, and that power of the *Militia*, to the touch; at length both King and Parliament come to one conclusion, consisting of three particulars.

First, *That the King for the time being* (whether by right or wrong) *ought to have the Subjects Allegiance*; like to that of the wise Counsellor of that brave King of Israel, *Whom the Lord and his People, and all the men of Israel chuse, his will I be.*

- 1 H. 7. c. 1. And this is not only declared by the expresse words in the Preface of the Law, but also by the King's own practice: For he discharged such as aided him against
1 H. 7. c. 6. Richard the Third then King, by pardon by Parliament; but such as aided him being King by declaration of the Law.

Secondly, *That this Allegiance draweth therewith ingagement for the defence of that King and Kingdom.*

Thirdly, *That the discharge of this Service, whereto the Subjects are bound by Allegiance, ought not to be imputed unto them as Treason: Nor shall any person be impeached or attainted therefore.* The first and the last of these need no dispute.

The Second is more worthy of consideration, in the particular words set down in the Statute, *viz. That the Subjects are to serve their Prince in his Wars, for the defence of him and the Land, against every Rebellion, Power, and Might, reared against him; and with him to enter and abide in Service in Battle.* Wherein two things are to be considered, the *Service*, and the *Time or Occasion*.

The

The Service is, *to serve the Prince in his Wars, and with him to enter and abide in service in Battel*: which is the less to be stood upon, because there is a condition annexed, *if the case so require*; which must be determined by some Authority, not particularly mentioned: Albeit, that whatsoever is therein set down, is only by way of supposal in a Preface annexed to the Law by the King, and permitted by the Commons, that were as willing the same should be allowed, as the King himself; both of them being weary of Wars, and willing to admit this Conclusion, for the better security of them both in these doubtful times. But to lay all these aside: for the Case is not stated, till the Cause be considered; all this must be only when and where the King's Person and Kingdom is endangered by Rebellion, Power or Might reared against him. So as the King's Person must be present in the War for the defence of the Kingdom, or no Man is bound by his Allegiance to hazard his own Life. And then this point of Allegiance consisteth only in defending the King in the defence of the Land, or more particularly in defending the King's Person, he being then in the defence of the Land; and defending him in order to the defence of the Land. So as no Man can rationally infer from hence, that the King hath an universal power of Array when he pleases; because the King, when he pleases, may not levy War, nor make other War than a defensive War, *when the Land is endangered, or when need shall require*; as another Statute hath it. But who shall determine this need or danger, neither in these or any other Laws is mentioned; either out of want of occasion, or by reason of the tenderness of the times, wherein both Prince and People were willing to decline the Question.

Secondly, *the Persons* that are to do this service, are to be consider'd of; and although they are indefinitely set down under the word *Subjects*, it may be supposed that the word is not to be taken in so large a sense, as to comprehend all of all Ages, Sexes, Callings, and Conditions; in regard that even by the Common-Law, some of each of these sorts are discharged from such service. But it may seem, the King was neither satisfied with the expressions of this first Law concerning the occasion or time of this service; nor did he see sufficient ground under the notion of bare Allegiance, to desire more. Therefore new ways are by him found out; his Patentees were not a few: and although few or none could ever boast much of any cheap Purchases gained from him (for he was wont to be well paid before-hand for his Patents, either by Money, or that which was as beneficial to him,) yet he was resolved that their holding should be no less advantageous to him, than their having. And therefore in plain words he lets them know, that notwithstanding former considerations, upon which they had their Patents at the first, they must fight for him, if they will live upon him; and either adventure their Lives or their Benefit, chuse they which: and if they find fault with their condition, he touches them with the Law of their Allegiance. And thus he makes way to intimate a claim of a more absolute Allegiance: for being to shew the Equity of the Law, in regard of their Allegiance, he tells them, *That every Subject is bound by his Allegiance, to serve and assist his Prince and Sovereign Lord, at all seasons, when need shall require*. General words, that affirm nothing in certainty, yet do glance shrewdly upon an absolute and universal assistance. Then coming to drive the Nail home, it is said, that the Patentees are bound to give their attendance upon his Royal Person, to defend the same when he shall fortune to go in his Person to Wars, for the defence of the Realm, or against his Rebels and Enemies. (And as another Statute addeth)

addeth) *Within the same Realm, or without, and according to their Allegiance; and not to depart without especial Licence, or until general Proclamation of dismissal.* In short therefore, here is a new *Militia*, as touching the King's *Patentees*; they must attend the King's Person whither ever the King will lead them, either within the Realm, or without; whether against such as he will suppose to be his Enemies abroad, or if he will mistake his Subjects for his Enemies at home. And this under the colour of *Allegiance*, published in *doubtful expressions*, as if it were not meet that *Henry the Seventh* (that loved not to yoke himself to the Law) should yoke his Laws under the Laws of *plain Language*: Or rather, that he held it a point of Policy to publish his Laws in a doubtful stile, that such as durst question his Laws, might have no positive Charge against them; and such as dared not to enter into the List with him, might not be bold to come nigh the breadth of them.

11 H. 7. c.
18.
19 H. 7. c.
1.

Nevertheless, neither doth the glance of *Allegiance* in the Preface of the former, nor in the body of the later Statute, any whit confirm, that what is in them enacted, is done upon the ground of *Allegiance*; but contrarily, when as the first Statute cometh to the point, it startles from the ground of *Allegiance*, and flies to the ground of a kind of Equity or Reason. And the second resorteth to the first as its proper ground, as being a supplement thereunto in Cases forgotten, and so omitted; though it may be rather thought that the King creeping up into his height by degrees, made the former only as an Essay, to prepare the way for the latter; like the point of the Wedge, that maketh way for the bulk and body thereof. The truth of this Assertion will be more manifest from the nature of both these Laws, being limited both in regard of *time* and *person*. In regard of *time*; for both these Laws are but temporary, and to continue only during the Life of *Henry the Seventh*, in regard the advancements therein mentioned, as the moving Cause, are only the advancements made by himself. Secondly, in regard of the *person*; for all *persons* that received Advancements from him, are not bound thereby; namely those that come into such Advancement by purchase for Money: Neither are Judges and other Officers excepted persons in the said Statutes. If therefore *Allegiance* had been the ground of these Laws, it had equally bound all who are under the Bond, and no Equity could have given a general Rule of discharge unto such condition of Men. It had likewise bound as well formerly and afterwards, as during this King's Reign; and therefore whatever semblance is made therein concerning *Allegiance*, there had been no need of such Law, if *Allegiance* could have done the deed, or if the power of *Array* had been of that large extent, as it hath lately been taken. In my conceit therefore, these two Laws do hold forth nothing that is new, but a mind that *Henry the Seventh* had to fill his Coffers, though his mind would not so fill. He would have Soldiers, but they must be his *Patentees*; not for any skill or valour in them above others, but he hoped they would compound with him for Licences to absent, rather than to adventure themselves; and so he might get the more Money, that could find pay for Soldiers more and better than they were or would be. For otherwise the *Patentees* might by the Statute have been allowed to serve the King by their Deputies; which would have done the King better service in the Wars, than themselves could have done. And for this very purpose, much use was made of these Statutes, as well by *Henry the Seventh*, as *Henry the Eighth*, both for *Licences* and *Pardons*, for composition in such Cases, as their Records do plentifully shew.

Secondly, Let the Claim of Kings be what it will, yet the matter in fact shews plainly that they never had possession of what they claimed. Both these Kings pretended a Foreign War, each of them once against one and the same Nation, and to that end advanced to one place with their Armies; although the one went in good earnest, the other in jest. Their Armies were not gathered by Prerogative, but of *Voluntiers*: This not only the Records, but also the Statutes do clearly set forth. Some Soldiers served under Captains of their own choice; and therefore the Law inflicteth a Penalty upon such Captains as bring not their number compleat, according to their undertaking: other Soldiers are levied by Commission, by way of *Imprest*, which in those days were *Voluntiers* also, and expecting favour from the Publick; the rather, because they devoted themselves thereto, without relation to any private Captain; they willingly therefore received *Imprest*-money. And of this course the State saw a necessity, both for the better choice of men, and for the more publick owning of the Work. For such as had been usually levied by the Captains, were fit only to fill up room, and make up the number; and yet many times there was a failing in that also: and this manner of raising the Infantry, was continued by Henry the Eighth, as by the like Law in his time may appear. As touching the levying of the Horse, although divers Statutes were made for the maintenance of the Breed of Horses, and Persons of all degrees of ability were assessed at the finding and maintaining of a certain number of Horses: yet do none of them tell us, that they shall find and maintain them armed compleatly for the Wars, nor shall send them forth upon their own charge; and therefore I suppose they were raised as formerly. These two Kings had the happiness to be admired; the one for his shrewd cunning Head, the other for a resolute and courageous Heart: And it was no hard matter to find men that loved to ingratiate themselves, and endeavour to catch their favour, though with the adventure of their Lives; especially if they looked after Honour and Glory, which as a Crown, they saw, pitched at the Goal of their Actions.

Thirdly, Concerning the *Pay* of the *Soldier*, the Law was the same as formerly, the same was ascertained by the Statute-Law: the payment was to be made by the Captain, under peril of Imprisonment, and forfeiture of Goods and Chattels; and the true number of the Soldiers to be maintained and listed, under the like peril.

Fourthly, As touching the *Soldiers Service*, the same course also was taken as before; if they desert their Colours, they should be punished as Felons, and the manner of trial to be at the Common-Law.

Fifthly, For *Fortifications*, the Power properly belongeth to the Supreme Authority to give order therein. For the People may not *fortify* themselves (otherwise than in their particular Houses, which are reputed every man's *Castle*) because *publick Forts* are Enemies to the publick Peace, unless in case of publick danger; concerning which, private Persons can make no determination. And furthermore, no *Fortifications* can be made and maintained, without abridgment of the common Liberty of the People; either by impairing their *Freehold*, or exacting their Labour, or other Contribution; none of which ought to be done, but by publick Law. And therefore when the Inhabitants of the County of *Cornwall* were to make defence against Invasion and Piracy from the Coast of *Little Britain*, in regard they were a long slender County, and upon sudden surprizals People could not so readily flock together for their joint defence, they obtained an Act of Parliament

4 H. 8. c. 1. to give them power to fortify the Sea-coasts according to the direction of the Sheriff and Justices of the Peace.

Lastly, *Wars* once begun, must be maintained at the charge of the undertakers. If they be the *King's own Wars*, he must maintain them out of his own Treasury, till the benefit of them do prove to the common good; and in such cases the charges have been sometimes provided before the work, by Act of Parliament, and sometimes after.

Henry the Seventh, and *Henry* the Eighth, both of them at their several times went to *Boloigne* with their Armies. *Henry* the Seventh with an intent to gain profit to himself by an advantageous peace; and had his ends therein, and was ashamed to ask aid of the people towards the charges of that War.

Henry the Eighth went upon his own charge also with his Army, trusting to the Parliament for consideration to be had of his employment (wherein his expectation did not fail) and made *Queen Catherine* General of all the Forces of *England* in his absence, and gave her power, with other five Noble Personages, to take up Money upon *Loan*, as occasion should require, and to give security of the same, for the maintaining and raising of Forces, if need should require; as is more particularly set forth in the Patent-Rolls of these times. Nevertheless, the War at Sea *infra quatuor Maria*, was ever reputed *defensive* as to the Nation, and under the publick charge; because no War could be there, but an Enemy must be at hand, and so the Nation in imminent danger; and therefore the maintenance of the Navy-Royal in such cases was from the publick Treasury.

7 H. 8. c. 2. of Levies of Men for War, payment of Soldiers, and their deportment, in cases
23 c. p. 7. of Fortifications, and of maintenance of Wars at Sea, and the deportment of such
32 cap. 14. as are employed therein; I say, if they give the Law, and carry the Supreme Directory, then certainly the Law rules in that, which seems most lawless; and though Kings may be chief Commanders, yet they are not the chief Rulers.

C H A P. XXXIII.

Of the Peace.

PEACE and War originally depend upon the same power, because they relate each to other, as the end to the means; and receive motion from one and the same Fountain of Law, that ruleth both in Peace and War. It is very true, that several Ages hitherto have been troubled with arbitrary Exhalations; and these very times whereof we now treat, are not altogether clear from such an air. Two Kings we have at once in view, both of them of an elate spirit; one working more closely by Cunning, the other more openly by Command, yet neither of them pretending so high as to do all, or be all in all. Peace suited more with *Henry* the Seventh,

Seventh, than with his Son, who delighted to be accounted terrible, rather than good; yet both of them were glad enough to be at peace at home, and were industrious to that end, though by several means. *Henry* the Seventh pretended *Justice* and *Peace*, (a welcome news to a people that formerly accounted nothing theirs but by the leave of the Soldier) and therefore sets upon the Reformation of the *Sheriffs Courts*, in the entring of *Plaints*, and making of *Juries* suitable to that present time, wherein men of Estates were very scarce, and much of the Riches of the Nation evaporated into the Wars both Civil and Foreign. Although the continuance of that order concerning *Juries* in the succeeding times of opulency, hath brought these Courts into contempt, and made way thereby for the King's Courts to swell in Glory, and to advance *Prerogative* even above itself.

Secondly, he reforms *Goals*, as well in their number as their use. During the Civil Wars, every small party of men that could get a strong place, made the same not only a *Castle*, but a *Goal*, and usually imprisoned and ransomed at their own pleasure. For remedy whereof, *Henry* the Seventh restores all *Goals* to the *Sheriffs*, saving such as hold by Inheritance; and gives power to two *Justices of the Peace*, one being of the *Quorum*, to take bail in casesailable, and Recognizances of the Peace, to be certified at the next Sessions or *Goal-delivery*.

Thirdly, both Kings concur in providing against such disorders, as more immediately did trench upon the publick Peace, and reached at the Crown itself, by labouring to prevent by severe punishing; and lastly, by regulating the proceedings of Judicature in such cases.

These disorders were two; inordinate wearing of *Liveries*, and *unlawful Assemblies*: The first being in nature of *unlawful assembly of minds and spirits of men; the second, of their bodies and persons*. Both these had formerly been provided against; but the Judges of the Common Law, unto whose Cognizance these Crimes were holden, did restrain their punishments to the rule of the Common Law, then thought to be too facile and mean for disorders that did fly at so high a pitch; and therefore they are reduced before a higher Tribunal, as matter of State, as hath been already mentioned. The severity of punishment consisted not so much in aggravating the Pain, as the Crime; matters of injury being made *Felonies*, and those *Treasons*.

The Crime of *Treason*, at first it concerned matters acted against the Nation; afterwards it reached to matters acted against the King; now it reacheth even to the very thoughts and imaginations of the heart; not only of bodily harm to the King, but of the Queen, or their Heirs apparent, or tending to deprive them of their Title or Name of Royal Estate. This Crime was formerly made but Felony by *Henry* the Seventh, and then only extended to such offence committed by one of the King's Household against the Person of the King, or a Lord, or any of the Council, Steward, Treasurer, or Comptroller; so as the Person of the Queen was not then in the case, and yet then newly crowned, and at that instant bearing in her Womb the Royal Seed, which was then the only earnest of the stability and glory of *England*; and therefore it is a subject of wonderment, unless it were out of extremity of Jealousy, lest he should seem to make too great account of her Title,

Title, and thereby disparage his own. And then is it a piece of wit, but not without weakness; for he that is jealous of the slights of other men, shews himself unresolved in his own pretensions. Now *Henry* the Eighth not only raised the price, but added to the thing; and not only putteth the Queen, but the Prince her Heir apparent into the Case, making the same *Treason*. So as it implieth, that *English Allegiance* tieth the Subject, not only to the safety of the Person of the King, but also to the Queen and Heir apparent; otherwise the offence is made and declared *Treason* against the King.

Secondly, The Election of the Object is to be considered: for whether the one or other Statute be observed, it will appear, that although the King was the next Object expressed, yet a further was intended, and that the Crime is not intended, in regard of his *natural Capacity* as a man, but of his *politick Capacity*, and in relation to the common good of the Nation. And this is evident, not only from the several Prefaces of the Laws, but also from the manner of *Election*, whereby the Title of Heir apparent is taken up, and not the Eldest Son or Daughter, or these, and not the other Children, all which are equally dearly beloved in natural regard.

Thirdly, Though at the Common Law *Treason* be properly a Crime against *Allegiance*, yet as in Cases of Felony crimes may be by the Statute made as *Treason*, which at the Common Law are not against the *Legiance* of an *Englishman*; for this remaineth ever one and the same: but one and the same fact may be made *Treason*, and unmade, by the Statute-law, as befel this Law of *Henry* the Eighth, by a Law within twenty years after; like as also in former times, one and the same fact hath many times received the like measure. Other *Treasons* besides these already mentioned, were by *Henry* the Eighth created; as Marriage with any of the King's Sisters, Daughters or Aunts of the Father's side, or the Daughters of his Brethren or Sisters, without consent first had of the King: Counterfeiting current Money, not of the King's Coinage, was likewise made *Treason* by *Henry* the Seventh, who was well seen in that Mystery or Money-trade: and the like also became of Counterfeitures of the King's Privy Signet and Sign Manual.

And lastly, that horrid trick of *Poisoning* was reduced to this Category, rather that the Penalty might be more terrible in the Death (which was by boiling) than for any Tincture in the Nature of the Crime, or in any Forfeiture of Estate.

The policy of these times thus irritated against *Treason*, had proved very irregular, if the same had not been as rigid in cases of *Felony*. Divers new ones of that kind are also dubbed; amongst which *Conjuration* or *Witchcraft* comes first; an old *Felony* in the *Saxons* time, but since had gotten its *Clergy*, now well nigh for the space of Five hundred years, and they it; so as it never walked abroad amongst the *Laity*, but under the favour of the Cloistered People; nor ever came before the Civil Power, till now *Henry* the Eighth brought it forth into its own ancient and proper Regiment. Other Crimes, being those of the season, are made into the same degree: Such as were taking of Women into Captivity; unlawful Huntings with disguises; malicious breakings of the Dikes and Banks in *Marshlands*; Servants embezzling their Master's Goods to the value of Forty Shillings or upward, which

(besides

(besides that of *Heresy*, whereof formerly) though of a new stamp, yet of so good a constitution, that they remain unto this day under the same brand.

But let the Laws be never so severe, if they have not free liberty to walk at large, they are soon ghostless; and therefore these two Kings, especially the latter, gained that Honour above their Predecessors, that they gave the Law a free and full scope over all persons but themselves and their Assignees, and in all places. First, concerning places, every one knows the Notion, but few considered the extent of *Sanctuary ground* in *England*, that could *sanctify* any crime or criminal person in such manner, that though the eye of Justice could see, yet the hand of Justice could never reach them, till *Henry* the Eighth plundered them of all their *Sanctity*, and made all places common. So as no *Treason* could hide itself, but where the Act of Parliament did appoint, and turned their names from *Sanctuaries* to privileged places. The *Sanctity* of the person was yet more mischievous and hard to be reformed; it had been often attempted before these times, with little success. *Henry* the Seventh gained some ground herein beyond his Ancestors; the Delinquent might have his *Clergy* once, but not the second time, (though he fled to the *horns of the Altar*) and was ever after known by a brand in the hand. Thus far did *Henry* the Seventh go, and would have done more, even as far as unto those in *Holy Orders*. But *Henry* the Eighth coming on, in point of *Treason*, made all persons common, without respect of their Orders or Profession. Death makes an equal end of all. In cases of Murther, Robbery, Burning of Houses; Felonies done in holy Ground, High-way, or Dwelling-house; refusal of Trial; peremptory Challenge of above twenty of the Pannel; Servants embezzling their Masters Goods in value Forty shillings, or upwards; in all these Cases no Clergy could be allowed, but to persons in *Holy Orders*, and those also to be perpetually imprisoned in the Ordinaries Prison. And yet this exception held not long in force, but these Men also were equally wrapped up in the same course, to have their *Clergy*, and indure the *brand* even as other Men.

26 H. 8. c. 13.

27 H. 8. c. 19.

32 H. 8. c. 12.

4 H. 7. c. 13.

23 H. 8. c. 1.

4 H. 8. c. 12.

25 H. 8. c. 3.

23 H. 8. c. 1.

32 H. 8. c. 3.

Two difficulties yet remain, which hindred the execution of the Laws against *Treason*. One, concerning *Place*; the other, the *Person*.

The *Place* many times of the plotting and beginning of the *Treason* befalleth to be without the walk of the King's Writ; in which Case by the Common Law it cannot be inquired or tried: or it may be, that the men of the place be generally disaffected, and then no hope of finding out the matter. In such Cases therefore it is provided, that be the crime wheresoever the *Delinquent* will, it shall nevertheless be inquired, and tried where the *King* will.

28 H. 8. c. 15.

33 H. 8.

The *Person* of the Delinquent also many times changed its condition; it might be sober at the time of the Delinquency, and afterwards upon discovery prove *Lunatick*, and thereby avoid the Trial; this, whether in jest or earnest, by a Statute is made all one; and it is ordained, That in case the Fact be confessed by the Delinquent before the Lords of the Council, at such time as the party accused was of sound mind, and the same be attested under the hands of four of those Lords, the same shall be a good ground, to proceed to inquisition before Commissioners; and the same being found, to try the Delinquent without answer or appearance, saving unto Barons their Trial by their Peers. And thus however in their Fits, the Will of the Persons

35 H. 8. c. 22.

of

of these Kings was too hardy for the Kings to manage according to rule, yet the Law still in Title kept the Saddle, held the Reins, and remaineth the chief Arbitrator unto every Man.

C H A P. XXXIV.

Of the general Government of Edward the Sixth, Queen Mary, and Queen Elizabeth.

WE are at length come within sight of the shore, where finding the Currents various and swift, and the Waves rough, I shall first make my course through them severally, and then shall bring up the general Account of the Reigns of *One King, and Three Governours* *.

* i. e. the two
Seymours, a d
Duke of North-
umberland.

The King was a Youth of about Ten years old, yet was older than he seemed by Eleven years; for he had all the Ammunition of a wise King, and in one respect, beyond all his Predecessors, that made him King indeed, *By the Grace of God*. He was the only Son of *Henry the Eighth*; yet that was not all his Title, he being the first President in the point of a young Son, and two elder Daughters by several venters; the eldest of whom was now thirty years old, able enough to settle the Government of a distracted Nation; and the Son so young, as by an Act of Parliament, he was disabled to settle any Government at all, till he should pass the Fifteenth year of his Reign. But the thing was settled in the life-time of his Father, whose last Will, though it speak the choice, yet the Parliament made the Election, and declared it. The condition of this King's Person was every way tender; born and sustained by extraordinary means; which could never make his Days many, or Reign long. His spirit was soft and tractable, a dangerous temper in an ill air; but being fixed by a higher principle than nature yielded him, and the same beautified with excellent endowments of Nature, and Arts, and Tongues, he out-went all the Kings in his time of the Christian world. His Predecessors provided Apparel and Victual to this Nation, but he Education; and thereby fitted it to overcome a *fiery Tryal*, which soon followed his departure.

28 H. 8. c. 5.
35 H. 7. c. 1.

The *Model* of his Government was as tender as himself, scarce induring to see his Funeral; ready for every change, subject to tumults and Rebellions; an *old trick* that ever attends the beginning of Reformation, like the Wind the Sun-rising. The diversity of Interests in the Great Men, especially in point of Religion, for the most part first set these into Motion, for some of them had been so long maintained by the *Romish Law*, that they could never endure the Gospel: and yet the different Interests in matters of State made the greater noise. All was under a Protector fitly composed to the King's mind, but ill matched with rugged, humorous and aspiring minds; whereof one that should have been the Protector's great Friend, became his fatal Enemy; and though he were his Brother to prejudice his Interest, pawned his own *Blood*. The other, which was the Duke of *Northumberland*, had his will, but missed his end: for having removed the Protector out of the way, and gotten the chief power about the King, yet could he not hold long what he had gotten; for the King himself, after sixteen Months decaying, went into another World,

world, and left the Duke to stand or fall before some other Power; which came to pass upon the entry of the next Successor.

The greatest trouble of his Government arose from the prosecution of a design of his Grandfather, *Henry the Seventh*, for the uniting of the two Crowns of *England* and *Scotland* by marriage, and settling an enduring Peace within this Isle: and unto this Work all were Aiders in both Nations, but the Enemies of both. But God's ways are not as Man's; it is a rare Example, to find out one Marriage that did ever thrive to this end. *England* meant well, in proffering Love; but the Wooing was ill-favouredly carried on, by so much Blood.

Lastly, As the Government was now tender, so was it carried with much compliance with the People: which ever gives occasion to such of them that are irregular, to be more; and such as are well governed, to be less; because, though pleasing it be, yet it is with less awe and spirit: which renders their obedience, at the best, but careless and idle; unless such as are very conscientious be the more careful over their own ways, by how much their Superiours are the less.

NOT thus was *Queen Mary*, but (like a *Spaniard*) she over-ruled all Relations *Q. Mary.* and Engagements by Design: she was about Forty years old, and yet unmarried, when she came to the Throne; it may seem she wanted a mind to that course of life, from natural abstinency, or was loth to adventure her Feature (which was not excellent) to the Censure of any Prince of as high degree as she held her self to be; or her value was not known: so as to persons of meaner Interests, she might seem too much above; and to those of greater, too much beneath. Or possibly her Father was loth to let the world know her Title to the Crown, till needs must; or to raise up a Title for another man, so long as he had hope of a Son of his own to succeed him; and yet had formerly designed her for a Wife to *Charles the Fifth*, and afterwards to the Dauphine of *France*. Or it may be her self had set a command of her self, not to change her Estate, till she saw the course of the Crown either to or fro. However, the time is now come, that she must marry, or adventure her Womanhood upon an uncertain and troublesome state of Affairs. She liked the Lord *Courtnee* above the Prince of *Spain*, but feared he would not design with her. She held him not unmeet for her degree: for she feared he was good enough for her Sister, that then also had the Title of a Kingdom waiting so nigh her person, as she was an Object of Hope to her Friends, and Fear to her Enemies. And yet *Queen Mary* married the Prince of *Spain*: It may be it ran in the Blood, to marry into their own Blood; or rather, she was thereto led by *reason of State*, partly to enable her with greater security in the resettling of her Kingdom in the Popish Religion, wherein she knew she had to do with a People not easy to be reduced, where Conscience pretended Reluctancy; and partly to assure her Dominion against the Out-works of the *French* and *Scottish* designs. And so she yielded up the Supremacy of her Person to the Prince of *Spain*, but (thanks to the Nobility) the Supremacy of the Kingdom was reserved to her own use: for it was once in her purpose to have given up all to the man, rather than to miss of the man. And yet their condition was not much comfortable to either: The People's dislike of the Match sounded so loud abroad, that

Bodin. Rep.
lib. 6.

when the Prince was to come over, the Emperor his Father demanded fifty Pledges for his Son's safety during his abode in this Land; which was also denied. When he was come over, the *English* fear the *Spanish* Tyranny; and the *Spanish*, the old *Saxon* entertainment of the *Danes*. So both lie at their close guards; as after some time the King and Queen did no less: for the Queen was either never earnest in her affection, or now much less; finding his Body diseased, and his Mind lingering after unlawful game. On the other side, the King not finding that content in her Person (especially after her supposed Conception) that he expected, looked to his own Interest apart from hers, and thereby taught her to do the like. And this she thought cost *England* the loss of *Calis*, and he *Spain* the loss of many advantages that might have been obtained, and was expected from this Conjunction. Thus by the several Interests between the *King Regnant* and the *Queen Regent*, the Government of *England* became like a Knot dissolving, neither fast nor loose.

C. 2. Instit.
fol. 61.

Towards the People she might well be reserved, if not rigid: for she knew her entry was not very acceptable, though accepted; and that her Design was contrary to her Engagements: and therefore it was vain to think to please her self, and pleasure them. Nor did she much busy her thoughts therewith: that abominated trick of *Impost upon Merchandize* she brought into fashion, which had by many publick Acts been damned for the space of two hundred years. This was done without either shame or fear: for if the People turned head, she knew she had a good reserve from *Spain*; and the People might very well consider of that, though for her part she desired not much to improve that Foreign Interest; because she might well see that *Spain* designed to keep *England* so far beneath, that *France* might not get above: And that *Philip* neither loved the double Crown of *England*, no, nor the Triple Crown at *Rome*, otherwise than in order to that of *Spain*.

This distance between her and her King, wrought her to a more nigh dependency upon her Council and *English* Nobility; and so became less discerned in her Government; although questionless she did much, and wanted not Wisdom or Courage to have done more, but that she was not wholly her own Woman. All men do agree that she was devout in her kind of Profession, and therein as deeply engaged as her Brother *Edward* had been in his; though it may be he out of tenderness of Conscience, but she out of a *Spanish* kind of gravity, that endures not change: and whereunto she was well aided by her *Clergy*, who were her beloved for her Mother's sake; and now also so much the more sower, by how much the nigher to the bottom. It is the less wonder therefore, if the Zeal of these times burnt into a flame, that at length consumed even those that kindled it. In one thing more, above all the rest, she acted the part of her *Sex*, rather than that of her *Place*; and the same contrary to the advice of her Ghostly Fathers, and all Rules of Policy, and the Agreement between her King and self upon Marriage; which was the engaging of *England* in the War at *St. Quintins*, against the *French*, contrary to the National League formerly made. Nevertheless, the Issue was but suitable: for though the *English* obtained their part of the Honour of that day, yet in the consequence they lost *Calis*, the last foot that the *English* had in *France*; henceforth *England* must be content with a bare Title. As this was deserved, so was it also reserved by the Queen, to make the world believe that she died for grief therefore as a Mother of her Country; although her bodily Disease, contracted by a false Conception, wherein she beguiled both her self and the world,

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concurred thereto. In sum, *the worst that can be said of her, is this, That she was ill principled; and the best, That she acted according to her Principles:* And so lived an uncomfortable Life, shaped a bloody Reign, and had but a dim Conclusion.

The Night was now spent, and Queen Elizabeth, like the Morning-Star, rising into the Throne, sent forth the benignant Influence of both her Predecessors, and many ways excelled them both. She was begotten in a heat against Rome, wherein also she was born and trained up by her Father and Brother Edward's Order; and saw enough in her Sister's course, to confirm her therein: for Queen Mary was not very Catholick in her Throne, though she was in her Oratory. Nevertheless, Queen Elizabeth's course hereunto was very strange, and might seem in outward respects to lead her quite wide: for her youth was under a continual yoke; her Mother dead whiles she was at the breast; her Father owning her no further than as his Child born of a rebellious woman, never intending her for the Crown, so long as any hope was left of any other. With her age the Yoke grew more heavy; her Brother Edward being but of the half-blood, except in point of Religion, might respect her at a distance beyond his Mother's Family. But this lasted not long; her Sister Mary comes next, of a stranger blood to her than her Brother was; looking ever back upon her as one too nigh her heel, and more ready to tread upon her Train than to support it. The difference in Religion between them two, added yet further Leven; and this occasioned from her Sister to her, many sour reflections, bitter words, harsh usage, concluding with Imprisonment, and not without danger of Death. All which Queen Elizabeth saw well, made the less noise in Religion, walked warily, and resolved with patience to endure the brunt: For she might perceive by her Father's Will, that her way to the Crown, if ever she arrived at the end, must be through a Field of Blood; and though she knew her change of Religion might make the way more plain, yet God kept her in a patient waiting, until the set time was come. Thus passing over her Minority with little experience of youthful Pleasure, she had the happiness to have the less sense of youthful Lusts; which meeting with natural Endowments of the larger size, rendered her the goodliest Mirrour of a Queen Regent that ever the Sun shone upon; God adding thereto both Honour and Continuance, above all that ever sat in that Throne. Her entrance was with more joy to others than her self; for she kept her pace as treading among Thorns, and was still somewhat reserved, even in matters of Religion, though she was known to be devout. She had observed, that the hasty pace, both of her Brother and Sister, brought early Troubles, before either of them were well settled in their Throne. And therefore whereas her Sister first set up the Mass, and then endeavoured to settle it by Disputes, she contrarily first caused the point to be debated, and thereby gained liking to lay it aside. It is true, the Moderatorship in that Dispute, was imposed upon a Layman (as their term is) but his work being to hold the Disputants to order in debate, and not to determine the point in Controversy (which thing was left to the Auditory) might therefore more rationally be done by him, than censured by an Historian, that shall undertake to judge them all.

The first step thus made, one made way for another, till the whole became leavened. Her proceedings against Opposers were with much lenity, rather overlooking, than looking on; and such as stood more directly in her Path, she would

rather set aside than trample down; and be fair to all (without respect to difference of Religion) that would be fair to her. Much of her happiness depended upon Election of her Council, more in observing their advice; that whether she did rule, or were ruled, or did rule by being ruled, might deserve some consideration. This she did, to give satisfaction to such as took prejudice at her Sex, rather than out of any sense of imbecility in her own Intellectuals: for therein she equalled the best of her Predecessors, and in learned Endowments exceeded them all. Generally she was of a publick mind, if not popular; she loved to be seen of the People, and yet kept her distance. Her Sex taught her to use her Tongue much, and her Education to use it well and wisely: That, with a reserved Carriage, was her Scepter, winning thereby Applause from the inferiour sort, and Awe from the greater. A wise man that was an Eye-witness of many of her Actions, and of those that succeeded her, many times hath said, *That a Courtier might make a better Meal of one good Look from her, than of a Gift from some other King.* Another Felicity she had beyond others of her place; *She loved not to be tied, but would be knit unto her People.* To them she committed her confidence unto God, and they to her their chiefest Treasure on Earth, viz. Their Hearts to her Parliament, which was the most considerable Party that she had to deal with. She could personate Majesty equal to any Emperor; and advise, commend, yea, and chide if she saw occasion: And yet ever had a trick to come off with a kind Conclusion, without blur of Honour. So as of thirteen Parliaments called during her Reign, not one became abortive by unkindness; and yet not any one of them passed without *Subsidy* granted by the People, but one wherein none was desired. And sometimes the *Aid* was so liberal, that she refused the one half, and thanked the People for the remnant; a Courtesy that rang loud abroad, to the shame of other Princes. She would often mention her *Prerogative*, and yet not hold her self wise enough, either to interrupt the Judges in their way, nor the Bishops in theirs: Albeit, she spared not also, as she saw occasion, to check the best of them for their Irregularities. She had no Beloved, yet entertained Favourites at a cheaper rate, and in better order, than Kings use to do. For she had a preferment within her power beyond the reach of them all, and Passion also soon at command, or rather sometimes beyond command; yet if calmly taken, it ever proved good for that Party (that suffered) in the conclusion.

However, her Love she held under her own power, and therein excelled her Forefathers. She had the Precedent of her Sister (that adventured upon a Prince for her Bed, and missed what she expected, and lost what she had) and thereby learned to call into question the possibility for her to gain the private Contentments of a married Life, and therewith maintain her publick Interest in the Kingdom; and therefore resolved rather to sit alone, than to sit below; and to refuse the help of any Comfort, rather than to part with any one jot of her Interest in the People. So she remained above the People and her self, and thereby enjoyed both. But Custom in Government growing, together with Infirmities of Age, made her *Regency* at last taste somewhat stale and spiritless, and gave occasion to mens minds to wander after the next Successor. Before she had been nine years Queen, this scrutiny was once begun; but it received a fair answer of delay, because it was then taken as done in love: now the apprehensions hereof, according to her age, are more sad; she thinks them weary of her, and thereupon she is weary of her self and them. She supposes she can no longer give them content;

the Lords have the power, they will not be ruled : and such like dark thoughts working upon an aged body, weakned with other infirmities, wasted her spirits, and hastned a conclusion unto a weary life, herself not unwilling herewith, and her Courtiers less; who expecting more from Successors than they find, lived to dis-desire and unwish their former choice, by late repentance. Thus making the ending of her days, the renewing of her Reign in the hearts of all that observed her alive, or consider her (now dead) in the written Registers of her Fame.

C H A P. XXXV.

Of the Supreme Power during these Times.

THE Supreme Power, but erewhile monstrous in the two former King's times for Greatness, now suffers as great a diminution, over-shadowed by *Infancy, Womanhood, and Coverture*; and gives the People breath to beware for the future, *Ne potentes si nocere velint non possent*. Nevertheless, the loss was only of the Hydropical humour, and the Government came forth more clearly like it self. In the point of *Infancy*, *Edward* the Sixth bears it forth, being the seventh Precedent of *Infancy* ruling under Protectorship since the *Norman* times; yet beyond all the rest in managing his Supremacy in Church-matters, which none of them all did ever engage upon before him.

English Prerogative and Supremacy, are Notions of a sublime nature, and commonly looked upon as the Holy Mount at the delivery of the Law, at a great distance, for fear of death or undoing; and yet it is such a thing as a child may handle without hurt done either to the Estates, Persons, or Consciences of any man; because it is presupposed he does nothing but what the Law first dictates by his Council unto him. There is then no *Infancy* in the Crown, though in the person, because the wisdom of the Crown is not intended to rest in one Person, but in the Counsels of many, who are equally wise, whether the Person of the King be old or young. And the Statutes made by *Henry* the Eighth, by which ^{28 H. 8. c.} this King had power by his Letters-patent, after the age of 24 years, to annul any ^{17.} Act of Parliament made by him before that time, was not grounded either upon Principles of Law, or general Reason of State; but upon some particular circumstances of the state of the Affairs, as then they stood: and therefore is this power limited only to such Heirs or Assignees of *Henry* the Eighth, to whom the Crown shall come by his apointment. Nor did it ever thrive to that desired end whereunto it was intended: for upon the entry of *Edward* the Sixth, the Councils changed, and the Parliament took this Statute away, as scandalous to the Fundamental Government of the Nation and instead of the power of Adnulling, ^{1 E. 6. c. 12.} allowed of the power of Repealing; yet so, as until such time of *Repeal*, the said Statutes and all Acts thereupon done, shall for ever be deemed warrantable and good. This was too much, but that the Times were yet *in Equilibrio*, and men were loth to part with their Interests, which they did hang upon that Power of Reserve, unto the King's Letters-patent. Yet in that the Power is limited, not only in regard of the manner and time, but of the Persons, and also of the Statutes that are to be repealed: it is sufficient to vindicate the nature of this
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Prerogative (if such it were) to be no ways inherent, but acquired by Concession. But as touching the Legislative Power, they would not trust it in the least manner to any other King.

3 H. 8. c. 8.

The Parliament had crowned Proclamations at the instance of *Henry the Eighth*, with that Royal Title of Laws, in manner as formerly hath been noted. Now all Interest, both of the *Popish*, and of the *Reformed* parties of this Nation, are against it; the former, because they saw the King's present way to be against them; and both it and the latter, because the thing it self was abominable unto the Liberties of the people, and therefore it is soon taken away by *Repeal*, and the Legislative Power is wholly re-assumed to themselves, as formerly. For though in matters Ecclesiastical, the Power of the Crown might seem to be more pre-eminent in regard of the *Supremacy*, and some particular powers in making Bishops by Election without *Conse d'eslire*; yet did the Parliament neither yield or acknowledge any *Legislative Power* to be in the Crown thereby, but proceeded on in that way of the thirty and two Commissioners formerly agreed upon by them, in the time of the King's Father. Thus the King, though an Infant, was a gainer, and the Crown nevertheless still the same.

1 E. 6. c. 12.

1 E. 6. c. 22.

3 & 4 E. 6. c. 11.

Secondly, that Crown that may be worn by an Infant, may much rather be worn by a Woman, whose natural endowments do far exceed the other, and are not inferiour unto the most of men. Of this we have two Examples in these times, *Queen Mary* and *Queen Elizabeth*, of several professions in matters of Religion, and liable to exceptions in regard of their Sex, by men of counter-profession on both sides; yet both upheld the honour of the Crown, though therein the one more especially, being neither ingaged in the *Roman Cause*, nor in the Estate of Marriage, as the other was. This was *Queen Elizabeth*, in person a Woman, but in mind endowed with all the perfections of a man: she could not endure to abate one hair's breadth of her State; and yet upon the sole regard of her Sex, she submitted her Title of *Supremacy*, to a more moderate name of *Supreme Governour*, whereas her Father would be called *Supreme Head*; as if it were not only hazardous, but hideous for a Woman to be Supreme head of the

26 H. 8. c. 1.

Church. And for this cause would she not revive that Statute made by her Father, and continued by her Brother *Edward the Sixth*, and repealed by her Sister *Queen*

1 Eliz. c. 1.

Mary. Nevertheless such as she was, she had all such Jurisdictions, Privileges, Superiorities, and Pre-eminencies, Spiritual or Ecclesiastical, as by any Ecclesiastical Power or Authority formerly had been, or might be lawfully exercised for visitation of the Ecclesiastical State and Persons, and for Reformation, Order, Correction of the same, and all manner of Errors, Heresies, Schisms, Abuses, Offences, Contempts, and Enormities. She had therefore neither absolute Empire, nor absolute Jurisdiction over the Churches; neither power to make, declare, alter, or repeal any Law; neither did she ever exercise any such power but only by Act of

1 Eliz. c. 3.

Parliament. She had a Power over Ceremonies in the Worship of God, which was given her by the Parliament to execute by advice, and therefore was limited; as also was all the remainder of her Power in Jurisdiction Ecclesiastical. For she could do nothing in her own person, but by Commission; and these Commissioners must be Natives and Denizens, not Foreigners: and the same to be but in cer-

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tain Cases, and with certain Process. Some Cases of Ecclesiastical Cognizance were referred to Trial at the Common Law, viz. Such as concerned the publick Worship of God in cases of Forfeiture and Imprisonment. ^{13 Eliz. c. 12.} ^{23 Eliz. c. 1.}

Lastly, Neither had the Queen, nor her Commissioners, nor Bishops, absolute power over the *Church-Censures*; no censure was regarded but *Excommunication*, and that no further than in order to the writ *De Excommunicato capiendo*; and in all Cases the same was to be regulated according to the Statute in that case provided, or by the Common Law in case of Action. In all which we find no Jurisdiction in Cases Ecclesiastical, that is absolutely settled in the Crown. ^{5 Eliz. c. 23.} In matters Temporal the thing is yet more clear; she never altered, continued, repealed, nor explained any Law, otherwise than by Act of Parliament, whereof there are multitudes of examples in the Statutes of her Reign; and what she did by her Judges, was ever under Correction. A Woman she was, and therefore could be no Judge, much less in the Cases of difference concerning her self and her Crown. A Queen she was, and might make Judges, but she must go according to the Law; new Judicatories she could make none; nor judicially make, declare, alter, or determine the power of any Court or Judge in case of difficulty, but by her Parliament. As in the cases concerning the power of the Lord-keeper, the powers of the Commissioners of *Sewers* and charitable Uses, the Courts at *Westminster*, and the Country-Courts, in the several Statutes concerning the same, may more fully appear. ^{5 Eliz. c. 18.} And which is yet of a meaner size, her Power extended ^{13 Eliz. c. 9.} not to redress any inconvenience in process of Error or Delay in Courts of Law, ^{39 Eliz. c. 6.} nor to remedy Errors in Judgment, Fines, Recoveries, Attainders, or other ^{18 Eliz. c. 12.} matters of Record or Trial, whereof the Statutes of her time are full, and also ^{43 Eliz. c. 4.} the opinions and judgments of the Judges of the Common Law concurring therewith. (I mention not the power of Life and Member, which without all contradiction hath ever been under the protection of the known Law.) So as upon the whole account it will be evident, that this Queen had no absolute Pre-eminence in all cases, but either in contradiction to Foreign Power, or the Power of any particular person, and not in opposition to the joint interest of the Representative of *England*.

Queen *Mary* comes next, although a Woman as well as she, yea, her elder Sister and Predecessor, yet came short of her in the point of Supremacy, by a double submission, both unto the Law of a Husband, and of a Foreign Power in Cases Ecclesiastical; although the same was with such qualifications, as it was much more in Title and Pretence than in reality; and so in the conclusion, either approved her self to be good Wife, good Catholick, nor good Queen. She could be no good Wife, because she was too great for her Husband within the Realm, and resolved not to be without. A Catholick she was, but the worst that ever held her place: her Father appeared what he was, spake plain *English*, and was easily discerned. But she told the Pope a fair Tale of disclaiming Supremacy, and reconciling her Kingdom; yet none of her Predecessors did go beyond her in irregularity of her proceedings. Before ever she called Parliament, she settled the great work of Reformation; or rather Deformation in the Worship of God, by single Proclamation; and not only took away the Partition-wall of Doctrine by the like power, but gave way and power to Persecution thereupon to arise, before any Power or Order from the Holy See, then so called,

called, enabled her thereunto. And after that she had declared her self convinced, that she ought not to exercise Ecclesiastical Jurisdiction, and by her Instructions forbad the Bishops to use in their Process that Clause of *Regia Autoritate fulcitus*, yet even these Instructions had no other Authority than her own. And nevertheless, she still enforced the Execution of all matters concerning the publick Worship of God, and Government of the Church, when as yet the Pope had no admittance unto his ancient Claim. It is very true, that the Pope long ere now had made a fair offer, and the Queen had lent her ear; but her Train was too great to move as fast as was pretended; so as no meeting could be had till the Queen's Marriage with *Spain* was past; and such as were disaffected; found it was bootless to stop the Current of two such mighty Streams of Power now joined into one: and so that unclean spirit returned seven times worse than when he went out, and took *Seisin*, meerly upon Repeal of the Laws made by *Henry* the Eighth, in the Negative, without farther Grant or Livery. For though an expresse Embassage was sent to *Rome*, to perform the solemnity of the submission; yet the Pope died before the arrival of the Embassy, and the solemnity failing, left the Title of the Crown much blemished, yet was it not wholly defaced. For if the Statutes in *Henry* the Eighth, and *Edward* the Sixth's time, did but confirm the possession, it is evident that the repealing of those Statutes took away no Right from the Crown, nor gave legal possession to the Pope, that had formerly neither Possession nor Right: but left him to his *Remitter*, as in his ancient right, or rather in his ancient wrong. Yet right or wrong, *de facto*, he both did win and wear the Keys so long as the Queen lived, and so far as she pleased: for her devotion would not allow of absolute obedience in that kind, nor all for Gospel that the Pope said or did; but by her self and Council, executed the powers of Supremacy of Jurisdiction in Church-matters, not only in pursuance of the Papal Authority, but in crossing the same where the Pope's way crossed her opinion; as in the cases of the War between her Husband and *France*, and the Power *Legatine* of Cardinal *Pool*; her condemning of Doctrines and Books to be Heretical by Proclamation, establishing both Prayers and *Dirges*, and other Orders of publick Worship; whereof more fully in the publick Histories of those times, and the Queen's Injunctions upon occasion of the death of Pope *Julio*, is to be seen.

Lastly, she was no good *Queen*, not only because she gave up the people's Liberties in Ecclesiastical matters to the Foreign Jurisdiction of *Rome*, but undertook too much therein by far upon her own account; and in Civil affairs though *de jure* she was not inferiour to any of her Progenitors, yet she would have it declared by the Parliament; as if the consideration of her Sex or Birth had made some hesitation in her mind; and when she had made all clear, she commending herself thereby to the Prince of *Spain*, with her self, indangered likewise that trust of the Nation which she had received, and cast such a shadow upon her own Supremacy, as in many things it is hard to be discerned.

2 Mar. Par.
liament 2. c.
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Lastly, in her whole course uneven; sometimes appearing like the eldest Daughter of *Henry* the Eighth, at other times are like a Feme-covert, led by the will of her Lord and Husband, that wanting Supremacy himself, rendred her thereby beneath her self.

For first, she married by Act of Parliament, as if she were not at her own disposing; professing as much in her speech to the *Londoners*, upon the
Kentish

Kentish Rebellion. So a difference was made between the two Sisters; the Marriage of the one being by advice of Parliament, and the abstinence of the other against the same. Nor is the same altogether irrational; for by the one, the Government of the Nation is endangered; and by the other, otherwise.

Secondly, by her Marriage she became doubly married; one way relating to her Person unto the King, the other relating to her Trust unto her Council: For where a foreign mighty King is so nigh the Helm, it is dangerous to trust the same to his Wife, without the joint concurrence of the Lords. The matter in fact declared no less: for many times she had steered quite wide, had not the Lords been more stiff to their Principles than she.

The first year of her Marriage was Honey-moon with her; she thought nothing too dear for the King, and that herself was but meanly married, unless her Husband were as compleat a King in her Nation, as any of her Predecessors; although contrarily, the higher he was advanced, the meaner she became.

Thirdly, by her Marriage she adventured her Title of Supremacy of Jurisdiction. For *Philip*, as King, had the Honour, Stile, and Kingly Name, and so had the precedency. He had to do also with the Jurisdiction: for by the Articles of Marriage, he was to aid the Queen in her Administration of the Kingdom, and Maintenance of the Laws; Writs and Commissions passed under his name. He also sat in Parliament, voted therein, and joined in the *Royal Assent*. And lastly, joined in the publication and execution of all Laws. To him also was *Allegiance* due; and therefore the Crime of *Treason* was equally against his, as the Queen's Crown and Dignity, saving that as it was reserved to be as against him only during the time of Coverture. And yet had the Queen left Issue by him, it would have been a hard adventure for the Lawyers to have given their Opinion in that case, seeing the King had been *Guardian* to his Children during their *Minority*. 1 & 2 Phil. & Mary, c. 16.

Lastly, the whole power and jurisdiction resting in them both jointly, could not enable them to make or dissolve Courts at will, nor conclude Orders and Directions in cases of Plea and Conveyance, nor Process concerning the same. 1 Mar. Sess. 2. c. 11. & c. 5. & 7. & c. 12.

I shall sum up all in this one conclusion: If neither of these three had an absolute *Legislative Power*, either in matters concerning the Church or Commonwealth; if no absolute Jurisdiction, in case either of Life, Member, or Estate: If they neither can create, unite, or alter any Court, either concerning the Trial and determining the Estates of the People, or their own Revenue: If not alter or make any new Process in the Courts of Law: If not order common Assurances of Lands or Estates: And lastly, if they have no power in determining the *last Appeal* and definitive Sentence in matters of Controversy, but all must rest upon the Sentence by Parliament, there must certainly be found out a further sense of that grand Title of *Supremacy of Jurisdiction, Power, Superiority, Preeminence, and Authority*, than by the common Vogue hath been made.

The Title of *Supremacy* was first formed in the behalf of *Henry* the Eighth's Claim in Matters Ecclesiastical; which by the Statute is explained under these words of power: *To visit, correct, repress, redress Offences and Enormities*. This 29 H. 8. c. 1. Eliz. c. 2. Power, and no other, did Queen *Elizabeth* claim: witness the words of the Statute in her own time. But in the framing of the *Oath of Supremacy* in her time, not only in Causes *Ecclesiastical, but Temporal*, (which never came within the Statutes

Of the Power of the Parliament, during the

and publick Acts in *Henry the Seventh's* time) are inserted; and if any thing more was intended, it must come under the word *Things*, which also was inserted in the said Oath; and yet if the words of the Statute of *Queen Elizabeth* formerly mentioned be credited, the word *Things* ought to comprehend no more than the word *Causes*, and then the power of *Queen Elizabeth* in the Commonwealth will be comprehended in these words of Supremacy; to *visit, correct, repress, redress Offences* and *Enormities*: for the Supremacy in the Church and Commonwealth, is the same in Measure; and what more than this, I cannot understand out of any publick Act of this Nation.

Now in regard *Offences* and *Enormities* are properly against Laws, the power to *visit* and *correct*, must also be regulated according to Laws, either of War or Peace: Nor do these five words, *Jurisdiction, Power, Superiority, Pre-eminence, and Authority*, contain any more *Supremacy*, or other sense; for two of them speak only the Rank or Degree of the Queen in Government, *viz. Superiority* and *Pre-eminence* belongeth only to her, and not to any other Foreign Power. And two other words do note her Right and Title thereto, by *Power* and *Authority* committed to her. And the other word denotes the thing wherein she hath *Superiority* and *Power, viz. in Jurisdiction*: the nature of which word, *Ulpian* (speaking of the nature of a mixt Government) explaineth thus; *Quando servata dictione juris judiciorum fit animadversio*. So as this *Supreme Authority in Jurisdiction*, is no other than *Supreme power to Visit, correct, redress Offences*, or determine matters in doubt, by deputing fit persons to that end and purpose according to the Law; and this is all the *Supremacy* that appeareth to me, belonging to the Crown in these times.

C H A P. XXXVI.

Of the Power of the Parliament during these times.

WHEN the Throne is full of a King, and he is as full of opinion of his own sufficiency and power, a Parliament is looked upon as an old fashion out of Fashion, and serves for little other than for present shift, when Kings have run themselves over head and ears. A Condition that those of that high degree are extremely subject unto; but where the Crown is too heavy for the wearer, by reason of infirmity, the Parliament is looked upon as the chief Supporters in the maintaining both the Honour and Power of that Authority, that otherwise would fall under contempt. A Work that must be done with a curious touch, and a clear hand; or they must look for the like Censure to that of a King to a great Lord that crowned him: *My Lord I like your work very well, but you have left the print of your fingers upon my Crown*. Such was the condition of these times, wherein a Child and two Women are the chief; but ever under the correction and direction of the Common Council, in matters of common concernment. Two things declare the point; the course of the *Title* of the Crown, and the Order of the *Powers* thereof.

The *Title* ever had a Law, which was at the Helm, although diversly expounded. Kings ever loved the Rule of *Inheritance*, and therefore usually strained their Pedigree hard to make both ends meet, though in truth they were *guilty oftentimes to themselves, that they were not within the degrees. The People ever loved the

* conscious.

the Title of *Election*; and though ever they joined it to the Royal Blood; and many times to the *right Heir*, to make the same pass more current without interruption of the first love between them and their Princes; yet more often had they Kings that could not boast much of their Birthright in their first entry into their Throne. Of three and twenty Kings from the *Saxons* time, four of the former had no Title by *Inheritance*; the two *Williams*, *Henry* the first, and King *Stephen*. Two others, *viz.* *Henry* the Second and *Richard* the First, had right of *Birth*, yet came in by *Compact*. The Seventh, which was King *John*, had no Title but *Election*. The Eighth, *viz.* *Henry* the Third, came in a *Child*, and contrary to *Compact* between the Nobility and the *French Lewis*. The Ninth and Tenth succeeded as by unquestionable Title of *Descent*, yet the Nobles were pre-engaged. The Eleventh, which was *Edward* the Third, in his entry *eldest Son*, but not *Heir*, for his Father was alive; but his Successor was his *Heir*: It is true, there were other Children of *Edward* the Third alive, that were more worthy of the Crown; but they were too many to agree in any but a *Child*, that might be ruled by themselves. Three next of the ensuing Kings, were of a collateral line. Their two Successors, *viz.* *Edward* the Fourth, and *Edward* the Fifth, were of the Line; yet *Edward* the Fourth came in by *disseisin*, and *Edward* the Fifth by *permission*. *Richard* the Third, and *Henry* the Seventh, were collateral to one another, and also to the right Blood. *Henry* the Eighth, though when he was a King might claim from his Mother, yet came in as *Heir* to his Father. And if *Edward* the Sixth was right *Heir* to the House of *York* by his Grandmother, yet cannot the Crown be said to descend upon the two Sisters, neither as *Heirs* to him, nor *Henry* the Eighth, nor to one another, so long as the Statute of their *Illegitimation* remained; which, as touching Queen *Mary*, was till three months after her entry upon the Throne; and as touching Queen *Elizabeth*, for ever: for that *Virago* provided for her self, not by way of *Repeal* (as her Sister had done) but more tenderly regarding the Honour of her Father and the Parliament, than to mention their blemishes in Government, by doing and undoing. She over-looked that Act of *Henry* the Eighth, and the Notion of *Inheritance*, and contented her self with her Title by the Statute made by her Father in his Thirty fifth year; which to her was a meer purchase; and was not ashamed to declare to all the world, that she did *have* and *bold* thereby, and that it was *High Treason* for any Subject to deny that the Course of the Crown of England is to be ordered by Act of Parliament. And this power did the Parliament exercise, not only in ordering the course of the Crown to Queen *Mary* and Queen *Elizabeth*, but during the Reign of Queen *Elizabeth*, so far as to disinherit and disable any person who shall pretend Right to the Crown, in opposition to the Right of Queen *Elizabeth*. And upon this point only, did the whole proceedings against *Mary* Queen of *Scots* depend; who claimed to be, and doubtless was *Heir* unto *Henry* the Eighth, after the determination of the Right Line; and yet she was put to death for pretending Right by the Common Law, in opposition to the Act of Parliament. True it is, that this Doctrine doth not down well with those that do pretend to Prerogative, aided (as they say) by the Act of Recognition made to King *James*, and the Oaths of Supremacy and Allegiance; which do make much parley concerning Inheritance and Heirs. Nevertheless it is as true, that the Act of Recognition made no Law for the future; nor doth the same cross the Statute of 13 *Eliz.* Nor doth

Bodin. rep. l. 6.

28 H. 8. c. 7.
1 Mar. Sess. 2.
cap. 1.

35 H. 8. c. 1.

13 Eliz. c. 1.

Thuan. vol. 1.
lib. 20.

1 Jac. cap. 1.

it take away the power of the Parliament from over-ruling the course of the Common Law for After-Ages. Nor do the Oaths of Supremacy and Allegiance hold forth any such Obligation unto Heirs, otherwise than as supposing them to be Successors, and in that relation only. And therefore was no such Allegiance due to Edward the Sixth, Queen Mary, or Queen Elizabeth, until they were actually possessed of the Crown; as may appear by the Oath affirmed by the Statute of Henry the Eighth touching their Succession. Nor did the Law suppose any Treason could be acted against the Heirs of Edward the Sixth, Queen Mary, or Queen Elizabeth, until those Heirs were actually possessed of the Crown, and so were Kings and Queens; as by express words in the several Statutes do appear. Nor did the Recognition by the Parliament made to Queen Elizabeth, declare any engagement of the People to assist and defend her, and the Heirs of her Body; otherwise than with this Limitation, *Being Kings and Queens of this Realm*; as by the Statute in that behalf made doth appear.

35 H. 8 c. 1.
1 Eliz. 6. c. 12, 5 & 6.
E. 6. c. 11.
1 & 2 Phil. & Mar. c. 10.
1 Eliz. cap. 6.
1 Eliz. cap. 3.

And lastly (had those Oaths been otherwise understood) the Crown had by the virtue of them been pre-engaged, so as it could never have descended to Queen Mary, Queen Elizabeth, or King James, but must have remained to the Heirs of Edward the Sixth for ever.

Secondly, the same power that the Parliament exercised in ordering the course of Succession in the Crown, they exercised likewise in determining and distributing the Powers and Privileges belonging to the same: for these times were full of Novelties. The Crown had formerly fitted a Child's head more than once, but it never tried to fit a Woman's head since the Saxons times, till now that it must make trial of two. France might afford us a trick of the *Salique Law*, if it might find acceptance. And the unsettled state of the People, especially in matter of Religion, might require the wisest man living to sit at the Helm, and yet himself not sufficient to steer a right course to the Harbour. Nevertheless, the Parliament having the Statute of Henry the Eighth to lead the way, chose rather to pursue a Rule than to make one, and soon determined the point, viz. *That the Crown of England, with all the Privileges thereof, equally belong to a Woman in possession, as to a Man or a Child*. A bold Adventure I say it was, but that Henry the Eighth was a bold Leader; and yet the bolder it was, if the consequence be considered. For Queen Mary, as a Woman, brought in one new Precedent, but in her Marriage a worse: for she aimed not only at a foreign Blood, but at a Prince in Power and Majesty exceeding her own; and thereby seeking advancement both to her self and her Realm, endangered both. The matter was long in debate between the Spanish and English, and now had busied their Wits about ten years; at length a Supremacy is formed suitable to the Lord and Husband of Queen Mary, that could not be content to be one inch lower than her self. Philip had the name of a King, and Precedency; and in many cases, not without the Allegiance of the English. Their offences against his person, equally Treason with those against the Queen's own person; and Indictments run, *Contra pacem & coronam D. Regis & Reginae*. That in some cases he participated in the Regal Power, may appear, in that by the Articles he was to aid the Queen in the Administration of the Kingdom; he joined with the Queen in the Royal Assent, and in Commissions, Letters-patent, and in Writs of Summons of Parliament, as well as others; yet in the words the Crown is reserved only to the Queen, and she must reign as sole Queen. Now if the King had broken

1 Mar. Parl. cap. 1.
Sleidan.
1 Ph. & Mar. Parl. 2. c. 10.
2 Ph. & Mar. Parl. 2. c. 1.

broken this Agreement, either the Parliament must over-rule the whole, or all that is done must be undone, and *England* must bear the burden. A *Queen Regent* is doubtless a dangerous condition for *England*, above that of an *Infant-King*, unless she be married only to her people.

This was observed by *Queen Elizabeth*, who therefore kept her self unmarried; nor did the people otherwise desire her Marriage, than in relation to Posterity. Few of them liking any one of their own Nation so well, as to prefer him so highly above themselves; and fewer any Foreigner. This was soon espied by Foreign Princes; and the Queen her self perceiving that she was like to receive prejudice hereby in her interest amongst them, signified by her Embassadors, that she never meant to stoop so low as to match with any of her Subjects; but intended to make her choice of some Foreign Prince, who neither by Power or Riches should be able to prejudice the interest of any of her Neighbouring Princes. A pretty Complement this was, to gain expectation from those abroad, and better correspondence thereunto. Upon this ground divers Princes conceived hopes of more interest than by trial they could find. And the Arch-Duke of *Austria* began a Treaty, which seemingly was entertained by her; but her Proposals were such, as silenced all those of the *Austrian* Interest for ever after, viz.

1. That the Romish Religion should never be admitted into England.
2. That no man that she married should ever wear the Title of King.
3. That no Foreigner should ever intermeddle in the Rule and Government of the Church or Commonwealth, nor in the Ministry of the Church.
4. That if he survived the Queen, he should never challenge any Title or Interest in the Government, or any Possession in England.
5. She would never marry any one that she might not first see.

So as either she aimed at some inferiour Prince, that durst not look so high; or else she did but make semblance till she was nigh Forty years old: and in all declared, that she liked not her Sister *Mary's* choice.

To these two Powers of *Determining* and *Distributing*, I shall add a third of *Deputing*, which the Parliament exercised as formerly it had done. *Henry* the Eighth had in Ecclesiastical Matters exercised a power beyond the Law, and yet by Parliament had provided positive Laws, by which the same ought to have been ordered: these were also confirmed in *Edward* the Sixth's time, with some Additionals. By these, particular Commissioners were appointed for the making of Ecclesiastical Constitutions: and the King himself had a power of *Episcopofactory*, without *Conge d'eslire*. They likewise limited the power of Ecclesiastical Courts, altered their Process, reformed their Censures, even that grand Censure of Excommunication it self. The like, or much more, may be said of their *deputing* power in Civil Affairs; as well by enlarging the King's power, as in abridging the same. For whereas some of the Successors of *Henry* the Eighth, had power by virtue of his Letters-patent, after Twenty four years of age, to annul any Act of Parliament by them made before that age; in the time of *Edward* the Sixth, notwithstanding the *Proviso* of that Law, and although *Edward* the Sixth was not then Twelve years old, yet the Parliament repealed all, and restored to *Edward* the Sixth only that power for the time to come; but not to any of his Successors. And whereas *Henry* the Eighth had gained to himself and his Successors a *Legislative Power*

Bodin de Rep.
lib. 6.

3 & 4 E. 6.

c. 11.

1 Eliz. c. 1.

1 Edw. 6. c. 1.

1 Edw. 6. c. 2.

5 & 6 E. 6. c.

1.

5 Eliz. c. 20.

1 Edw. 6. c.

11.

¹ Edw. 6. c. 11. *Power* by Proclamation; the Parliament in *Edward* the Sixth's time took the same quite away, and reduced Proclamations into their former sober posture. The like may be observed of the power of the Parliament, in ordering the Lives, Members, and Estates of the People in matters criminal; and in making and altering Courts of Justice, and bounding their Power, altering their Process, abridging their Terms for Judicature, reforming Errors in pleading, amending common Conveyances and Assurance, as in passing Fines with Proclamations; their course in Counties Palatine; Limitations of Prescription; fraudulent Deeds; Recoveries by Collusion, &c. in all which the Crown had no power, but in and by the Parliament. Many particulars more might be added, if the matter so required; for the Statutes are more full in these later Times than formerly, and may soon lead us beyond a just period in so clear a matter.

C H A P. XXXVII.

Of Jurisdiction Ecclesiastical in these last Times.

IN the general, and in relation to the Foreign Jurisdiction of *Rome*, it was like a Child in an Ague, under Fits of heat and cold; but in it self, under the *Prelacy*, still growing in stature though not in strength. *Edward* the Sixth came in like a Storm that tore up *Episcopacy* by the roots, yet a Top-root remained intire with the Stock, bearing shew of a kind of Divinity, that though bared of the old Soil of the *Papacy*, yet transplanted into the new Mould of *Royalty*, soon conveyed a new life, which made the Stock still flourish, and grow into a better condition than formerly it had. Their *Legislative Power* in matters concerning their own interest, though formerly in outward view seeming their own, yet was doubly disturbed from the Pope and the King; who, though many times they opposed one another, yet evermore were both of them in opposition to the Church, and with the greater bitterness by their own mutual Emulations. But now the Church is come under the controul of only one, that joined with it for their mutual interest, as being both of them embarked in one and the same ship, [and that freighted with the People's Liberties.]

Two things concurred to the furtherance hereof.

First, The Times were *tender*, and scarce able to digest the change of Worship, now patronized by *Edward* the Sixth, much less able to digest the change of Government, if the same had been undertaken in a different way from what it was formerly.

Secondly, The Times were also *dark*, and few saw the bottom of *Prelacy*, but lodged all the prejudice in the persons that managed that calling. And certainly they had the less occasion to doubt of their own judgment therein, because *Edward* the Sixth had the good providence of God to lead him to make use of such men in that place*, that were meek, and holy, and themselves attempered in the fire of Persecution, and therefore more tenderly affected to others in that condition. And these carrying themselves like tender nursing Fathers in their places, wrought in the people a good opinion of their offices, and that Form of Government for their sakes. Yet even in those first Times of Reformation, somewhat appeared in that very quintessence of *Episcopacy*, in matters of Ceremony and Conformity, that might have taught wise men to be-ware. Upon such grounds as these it went well

* See *Stryke's* Life of Abp. *Griudal*.

well with *Episcopacy* in these first Times of Reformation, but ill with the Church in the issue. That *Prelacy* was a gainer by the change in *Henry* the Eighth's time, hath already appeared; and that it still gained, may further appear in these ensuing Considerations.

First, Whereas formerly *Bishops* were regardant both to the *Crown* and *Presbytery* (for so may the Dean and Chapter be accounted) in the point of Election by *Conse² E. 6. c. 2.* *d'esire*, now they are made the birth of the King's own breath; which thing was never deduced from the ancient Right of the Crown; (saving due Honour to the air of the Preface of the Statute) for in the best Times it * never had more than a * *i. e.* The power of *Investiture*: But from the necessity of the Times so corrupted, the *Deans* ^{Crown.} and *Chapters* generally were of the *Roman* † Spirit, and gave little hope of good ^{† Grind. Life, ut supra.} Elections by themselves. Besides, the state of Learning and Holiness was now at the low-water mark; so as little supply being looked for to begin the work of Reformation from beneath, they began above; and so it proved but a weak building for the longer time. And thus a lesson is left to future Parliaments, *That in Cases of Reformation they are not to be strictly bolden to Rules of Law or Precedent.*

Secondly, The *Prelates* hereby had their Authority confirmed by Act of Parliament, and so were now built upon a Foundation, that formerly did hang only upon a pin of power from *Rome*. For *Jurisdiction* without *Authority*, is but a Dropsy that brings inevitable consumption in the conclusion ||. And thus the *Prelacy* are ^{|| And yet Authority is supported by Jurisdiction.} inabled to *hold Courts* without contradiction, and directed in their *Process*, who formerly had a good Title to neither, in that course that they held the same.

Thirdly, Though their *Jurisdiction* was defined by the Statutes, yet in larger bounds than ever the Statute-Laws formerly noted; and in what they claimed power, they did it not altogether upon *Civil Right*, but still kept up an awful regard to their Persons and Power, as under the way of a *Divine Donation* *; and ^{* This is still pretended, the wise Men know on how weak Foundation.} therefore, as in those matters to them by the Statute allowed, they did proceed in the name and under the Seal of the King; so in other things of *Collation*, *Institution*, *Induction*, *Orders*, *Excommunication*, and such-like, they proceeded in and under their own Name and Seal; and, which was a Crown to all the rest, power is still given to the Archbishop of *Canterbury*, in cases of *Faculty* and *Dispensation*, to proceed under his own Seal, and not the King's, as if it were a power independent upon the Crown, and belonging unto the man; neither by Statute nor Commission, but coming by some secret Influence from the very place it self ||. ^{|| i. e. The pretended Divinity of their Office.} Al- though in the clear sense it is no more than a power of *Non obstante* in the point of obedience to the Canon-Law, which by a Statute in *Henry* the Eighth's time is declared no Law. But let this pass as a Mole in this fair Face of Church-government.

The *Prelates* are now become of the Vicinage, *Probi & legales homines*; they have their Jurisdiction by Law established; what they lose in breadth, they gain in height and goodness of their Foundation. Yet their Attire looks ill-favouredly in Queen *Mary's* eye; she will have it of the old cut again: and though Cardinal *Pool* was well seen in the *Roman* fashion, yet when he had done all, he did no more than shape a Garment to serve the present Interlude, neither fit to the body, nor

Of Ecclesiastical Jurisdiction, during the

nor easy to be worn; and therefore after four or five turns upon the Stage, it is thrown away. Nevertheless, during the time that *England* was thus dancing the *Italian* measure, *Prelacy* in *England* held its own Domestick garb so well, that neither *Poole* (being of *English* Blood, not much distant from the Crown, and then also holding the *Chair Legatine*, as little inferiour to the Throne) would not impose too much, nor *Queen Mary*, a woman of a stout Spirit, yield farther than she liked. By means whereof, the *Prelacy*, looking no more to *Rome* than the power in *Appeals*, and therein little more than the bare Title, played *Rex* all the while with the people, under colour of *Heresy* and the *Canon-Law*, which now was again made their Rule: And thus as touching their *Election* and *Jurisdiction*, they were as before. For *Queen Mary* did nothing but by single *Repeal*. But *Queen Elizabeth* being true *English*, both by Father and Mother, liking not this retreat, faced about, routed the *Roman* Fashion out of fashion; put *Prelacy* to its close guard, and received it upon capitulation, not only to mercy, but favour; and so it became her Vicar to exercise Ecclesiastical Jurisdiction *per saltum*: For it is hard to find by what steps they gained this pitch. *Henry* the Eighth was *Supreme Head* by submission of the Clergy, by Resumption, and by Act of Parliament; and as such, the power of *Bishops* formerly derived from *Rome* ceased; and *Henry* the Eighth after restored it anew, and settled the same by several Acts of Parliament; which *Edward* the Sixth confirmed, with divers additional Acts of further benefit to them, as hath been already noted. But *Queen Mary* altered all by *repeal* of the former Laws, and so left all in *Remitter*, as before the alteration by *Henry* the Eighth; and did neither give or grant any Jurisdiction to the Pope. Last of all comes *Queen Elizabeth*, and by *Repeal* and *Resumption* possessed her self of Jurisdiction Ecclesiastical; and granted Election of Bishops might be by *Conge d'eslire*, but never granted to the Bishops Ordinary Jurisdiction by any express Act, other than permission of them to continue in their former course; notwithstanding that the foundation of their Jurisdiction had been altered twice; and so it will be difficult for it to hold by Prescription or Custom, or any other way than by a kind of *Divine Right*, which began to be pretended, yet to this day could never be made evident to the World. Whatever the ground was, the thing is plain, that *Prelacy* in *Queen Elizabeth's* time had this honour allowed thereunto, that it was upholden by *Election* from Ecclesiastical Men, and held its Jurisdiction as from it self, and in the name of *Bishop* as *Ordinary*; and the power of *Excommunication* by a *saving* in the Statute-Law, and not by express *Donation*; notwithstanding the late Precedent in the time of *Edward* the Sixth to the contrary.

Secondly, the Rule of this *Jurisdiction* was no less at large; for the *Canon-Law* was determined by *Henry* the Eighth, and *Edward* the Sixth, and was not revived by any Act of Parliament, by *Queen Mary* or *Queen Elizabeth*, who neither pursued the *Medium* of the Thirty two Commissioners, nor settled other rule, but a few Canons, which (after some time) by *Queen Elizabeth* and her Clergy were agreed upon, but never confirmed by Act of Parliament. And so could never bind the Subject; and which in general set forth a kind of Form of Church-policy, yet no fashion of Jurisdiction, or rule of proceedings in the Ecclesiastical Courts; but in such cases left them to the *Canon-Law*, which was hidden in their own breasts, and could be made strait or wide as they pleased.

Thirdly,

Thirdly, their *Censures* now grew more sharp; for whereas at the utmost formerly they could do no more but *imprison*, or deliver over to the *Secular Power*, and that only in case of *Heresy*, and yet had scarce ground of Law for what they did: now they have an additional power, to *fine* and *imprison* in Cases of inferior nature, and so can reach all that a man hath, even to his skin. Nevertheless this was not annexed unto the ordinary Jurisdiction, but given by extraordinary Commission, called the *High Commission*; wherein, though many others were named, yet the Clergy and Canonists did the work; the rest being but in nature of a reserve to them, in case they were put to the rout. The power of these *Commissioners* was to execute the Queen's Jurisdiction in Causes Ecclesiastical: so as the Bishops are doubly interested in this work; one way, by supposed Commission from God, as *Ordinaries* within their own Dioceses only, and so may proceed to Excommunication or Deprivation; the other way, by *Commission* from the Queen, as Members of the High Commission, (for so many of them were such, as the Crown would please) and so they might *fine* and *imprison*. They might and did, I say, by their *Commission*, but not by the Statute that gives authority thereto, and therefore cannot be said to be done legally.

Fourthly, besides the contracted power of making Canons in the Convocation, by the power of the *Royal Assent*; the Queen had a power of making Laws by their consent, in matters of the criminal part of the Worship of God.

This might be tollerable for the Life of the one Queen, who might be presumed would (if she lived a few years) settle all things: but to subject the Consciences of all the people to the opinion of one *Metropolitan*, that might opinionate strange things; and that the Successors of the Queen should usurp this as a Flower of the Crown, to determine what is *for God's glory* in such cases, and to be always altering and patching up a Form, as he and his Metropolitan, or one of them alone, shall think meet, is neither commendable upon any grounds of Divinity or human Policy.

Now amidst the flourishing Estate of *Prelacy*, it is no wonder if the Churches be no gainers, but like Plants spending their Natures in luxuriant Branches, either are over-turned by the next blast of wind, or do wither upon the least change of Sky. That the whole ordering of the Church-Affairs rested originally in the Parliament, no man can question, considering whatever the Queen did, or had therein, was from the power of Acts of Parliament. And that the power of Excommunication it self, notwithstanding that the Church held it by way of reservation or *saving*, and not by *donation* from the Parliament, by an express Act; yet was that *saving* with such limitations, as that it received but a lame power, in comparison of what it claimed and exercised in former times. For whereas formerly the Churchmen had the Writ *De Excommunicato Capiendo* at their own beck; now it will not come, but upon Articles and certain Conditions.

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|---|----------------------|
| 1. In cases of <i>Heresy</i> . | 6. <i>Usury</i> . |
| 2. Of deserting of the <i>Sacrament</i> . | 7. <i>Simony</i> . |
| 3. Deserting of publick <i>Worship</i> . | 8. <i>Perjury</i> . |
| 4. Maintenance of <i>Error</i> . | 9. <i>Idolatry</i> . |
| 5. <i>Incontinency</i> . | |

In other matters the Spiritual Sword must find or make their own way, or else be quiet.

Secondly, the Church was now no less under the Chair and Throne, than under power of the Parliament; nor is it a wonder, if it could not thrive when it was so over dropped: for *Prelacy* by the King's arms is lifted up so high above the other Clergy, that the rest of the Clergy are as much underlings to the *Prelacy*, as the Prelates are to the King. They dare not offend the Crown, lest they should lose their *Honours*; nor the inferiour Clergy them, lest they should lose their *Living*s and *Liberties*: and so the *Prelates* speak the sense of the *Clergy*, and make the *Crown* their Oracle. And thus in the Church-matters the Crown is all in all. [*Voluntas & Potestas Dei, &c.*]

C H A P. XXXVIII.

Of the Militia in these latter Times.

IT cannot be denied, but as in the sober Government of this Nation there is a *Supremacy* of Command; so also in the rudest times of War, and wheresoever the same is settled, there must the *Militia* also be.

The word *Militia* is a general notion, sufficient enough for a name or title, but not to define the thing. I take it for nothing else but *the Government of the Commonwealth when it is in danger, or War, or in order thereunto*. It consisteth in the raising, arming, ordering, and paying of the *Soldiery*. The title of the *Supreme Power* in all this work hath been of late put to the question, and brought us to this sad condition of trial by *Battle*; and by Fighting to find out who had the chief power to fight. A Lesson that might have been learned from former Generations foregoing, at a far cheaper rate, when *England* is well in its wits. Where the *Law of Peace* is settled, there also is the *Law of War*; and in what condition the Crown standeth, in relation to the *Legislative Power*, in time of Peace, may be seen in the foregoing Discourse. In *War* the King is the people's General by his place; yet if any impediment do befall, either by natural disabilities, or civil, to render the person incapable of managing of the Service, there is no question but the people may order the matter as they please. With examples hereof these times are full, wherein we have had a *Child*, a *Virgin*, and a *Married Woman* to sway the Work; all of them in a very unmeet condition for such a Trust; and yet by the help they had *, they managed it well enough. The power of him as *King* or *General* in the Army, is all one; but before it is imbodyed, as a *King* only, he may do some things in order thereto, according to the Law and Custom of the Nation; yet this falls under a double consideration of the time and occasion. In the recess of the Parliament, he is the first mover, and ought to move by the advice of his Council, if occasion do provoke to Arms; but if the same befall, the Parliament then sitting, no History or Record do mention that ever he moved but by their concurrent advice and direction. The occasion either provoketh offensive or defensive War with other Nations, or with the people of his own Nation, in the case of Insurrection. Examples of War with other Nations, that may be called *offensive Wars*, we have but two; one in *Edward* the Sixth's time with *Scotland*, and which was but in pursuance of a War begun by his Father, and

* From the people.

and wherein the Kingdom stood engaged, in a case that concerned the publick good and safety, viz. *The Marriage of their King refused after promise made.* The other was in the time of Queen Mary, with the *French*, which somewhat reflected also upon the publick safety, but more upon the dishonour of the same. In none of these did either of the Supreme Powers *array*, or raise men by Prerogative, but only such as were *Voluntier* in that work. And because the people were ill-principled in *Edward* the Sixth's time, in regard of the change of Religion, he was induced to hire Foreign aid out of *Germany*. The Wars in the time of Queen *Elizabeth* were in order to the defence of this Nation, being ever under a malignant Aspect from abroad, especially from *Spain*, in *Ireland*, *France*, and the *Low Countries*. Yet were these Wars served only by *Voluntiers*; nor did any *Commission* give power of *impresting* men to serve against their wills in any Expedition made to any of those places, as the *Commissions* upon Record do testify. If any Levies of Men were otherwise made, or compulsory means used for such ends, they are to be reckoned up amongst the *errata*, whereof the Parliament took no notice, in regard saw it the ends and issues of such Reflections in Government to be successful and honourable; and that all was done by Council, and a Woman popularly affected; and therefore they less feared Invasion upon their Liberties. Or otherwise they are to be imputed to the condition of those places, being Members of the Common-wealth; as the cautionary Towns in the *Low Countries*, and the *Irish* Plantations were; and so befall under another consideration of a *defensive War*, in case of Invasion and common danger thereby, or by Intestine Broils; during which condition, as it is the King's duty to *levy* and *array* men, so is it the duty of the people to be ready to assist one another in all such exigences, and to defend the publick Liberty. Nevertheless, these *Arrays* are not left wholly at the Will of the King, but to discretion of the Council, how far the same shall extend. For never were general *Arrays* made, where but one Coast was in danger, and where no Conquest is in pretence, but only Piracy or Plunder. But if the disease were general, as in the year 88, the *Array* was general; and yet it was of none, but those that were of the Trained-Bands, besides such as were *Voluntiers*.

Secondly, The arming of these men was also diversly; there was no general Rule or Law for the arming of men since the time of *Edward* the First to the time of Queen Mary, but the Statute at *Winton*; the course of *Tenures*, I mean of such men as were of the *Militia* of this Kingdom: So that when they were raised, they were raised in their own Arms. But for such men as passed the Seas for Foreign Service, as they were *Voluntiers*, or sent over by the Parliament, these were armed according to special contract. But Queen Mary having gotten a safe reserve from *Spain* upon all adventures, and a strong interest amongst the people, by upholding the *Catholick party*, made no bones to innovate in the point of arming of the *Militia*, although it cost the people much more than was imposed upon their Ancestors. The pattern hereof was taken from the *Spanish* Cabinet; the Queen, being loth to be inferiour to her own Husband, in bringing as much strength to him as he to her, and both of them willing enough to appear potent in the eyes of *France*, that then stood in competition with them both. A yoke it was, yet neither the King nor Queen's Will, but the Parliament put it on; and ere an

Age

Age expired it was cast off again. For the better understanding, see it in this Scheme.

See the 1st
Part, p. 192.
&c. ib.

<i>Per Annum.</i>	<i>Lances.</i>	<i>Light-Horse.</i>	<i>Corsets.</i>	<i>Bows.</i>	<i>Hacquebuts.</i>	<i>Bills.</i>
1000 l.	6	10	40	30	20	20
1000 marks.	4	6	30	20	10	10
400 l.	2	4	20	15	6	
200 l.	1	2	10	8	3	
100 l.		2	3	3	2	
100 marks.		1	2	2	1	
40 l.			2	1	2	
20 l.			1	1	1	
10 l.			A Coat of Plate	1	1	
5 l.			A Coat of Plate	1		
<i>Goods</i>						
1000 marks.	1	1	2	4	3	
400 l.		1	1	2	1	
200 l.			1	2	1	
100 l.			1	2		
40 l.			2 Coats of Plate.	1		1
20 l.			1 Coat of Plate	2		1
10 l.				1		1

The *Lances* were to be compleatly harnessed, or the one half of them. The *Corsets* furnished with Coats of Mail and Pikes; the *Bows* with an Iron Cap, and a Sheaf of Arrows; the *Hacquebuts* with Sallets. All which was to be over and besides such Arms as men were bound unto by *Tenure*, or Covenant with the Landlord, or by Virtue of the Statute 33 H. 8. c. 5. Besides *Townships*, which were charged with joint-arms; *Annuities* and *Copy-holds* were charged as Goods. If the Arms were lost in the Service, the owner must make them good again. The defaults were punishable with Fine by the Justices of the Peace, who had the view, and might present them at the Sessions, to be proceeded upon as in other cases. Here is provision enough, yet not as the Arms of the *Militia* of the Kingdom, but as a Magazine in the hands of every particular man,

man, and as his proper Goods, to be imployed for the publick Service, either upon sudden Invasion in a defensive War, or when the Parliament shall send them abroad. And yet it is also a rule unto the Crown against arbitrary Assessments upon discretion, from which it cannot recede if it mean to do right.

It might now very well stand with the Justice of Queen *Elizabeth*, to grant *Commissions of Array, secundum formam Statutorum*, and do hurt to no man. It is true, her *Commissions of Lord-Lieutenancy* wanted that limitation in words, yet they carried the sense: For if the Crown were bound by the Law, the *Lord-Lieutenants* were much rather; but the danger arose after the death of Queen *Elizabeth*. For when King *James* came to the Crown, under colour of pleasing the people, and easing them of a burden, he pleased himself more, and made the yoke upon the people much more heavy in the conclusion; for where no declared Law is, there the discretion of them that have the care lying upon them must be the Rule. And thus came the *Scotish Blood* to have pretensions to a greater Prerogative than all their Predecessors had; upon this supposal, that the Statute of Queen *Mary* took away all former Laws of that kind, and then the taking away of the Statute of Queen *Mary*, takes away all declared Law as to that point. But more truly it may be inferred, that if all Statute-Laws be taken away, then the rule of *Tenures* at the Common Law must remain in force, and no other. Nevertheless, this Statute of Queen *Mary*, tho' in force for the present, was not a general rule for Arms in all places of this Nation; for the *Marches of Scotland* were a peculiar Jurisdiction as to this point. They stood in more constant need of Arms than any other part of this Nation, in regard of their uncertain condition, in relation to their neighbouring Jurisdiction; and therefore were the Farms of these parts generally contracted for, upon a special reservation of Arms for each particular; which being now decayed, are again reduced by Queen *Elizabeth* to their ancient²³ Eliz. c. 9. condition in the time of *Henry* the Eighth.

A second thing which may come under this general consideration of arming, is, the arming of places, by making of *Forts* and *Castles*; which was not in the immediate determinate will of the Crown to order as it pleased. For though they may seem to be means of Peace and present Safety, yet they are Symptoms of War, and in the best times are looked upon with a jealous eye, especially such as are not bordering upon the Coasts: Because that Prince that buildeth *Castles* within the Land, is supposed to fear the Neighbourhood. This was more especially regarded in the days of *Philip* and *Mary*: for when that Marriage was to be solemnized, it was one of the Articles, to provide for the safety of such *Forts* and *Castles*, as then were maintained; to the end they might be preserved free from¹ Mar. Parl. Usurpation, for the Use, Profit, Strength and Defence of the Realm, only by the² c. p. 2. natural born of the same. And afterwards when occasion was offered for the building of more of that nature, a new power is given to King *Philip* and Queen^{2 & 3 Phil. & Mar. cap. 1.} *Mary*, to re-edify or make *Forts* and *Castles*, which must be executed by Commission to the *Lieges* for ten years; and only within the Counties bordering upon *Scotland*, and these particularly named in the Statute. So as the Crown had not power to build in all cases, nor to any end they pleased. Nor to place therein, or betrust the same to whom it would. Nor yet had *Edward* the Sixth that absolute power, although not engaged in Foreign Interests; as his Sister *Mary* was: and therefore

therefore whereas *Castellans* had been made for life by Patent, and so the absolute power of the Crown was barred in the free disposal of the same during such time; the Parliament gave the King power to remove such as were not liked, or thought not faithful to the Publick Interest, although they gave no cause of seizure by any disloyal act. The like also may be observed of the Ships and Ordnance: for they also do belong to the State, as the Jewels of the Crown; and therefore upon the Marriage of Queen *Mary*, they also are by Articles preserved and saved, for the use, profit, strength and defence of the Realm by the natural born of the same.

Thirdly, As touching the ordering of the *Soldiery*, the matter is not much to be insisted upon; for little doubt is to be made, but that power that raiseth them, also ordereth them to the same ends that they are raised. And therefore, as the sole power of the Crown doth not the one, so neither doth it the other, but in cases formerly mentioned. And yet in no case, though the War be never so absolutely defensive, and the Soldiers raised by the King's own and only power, had the King absolute Authority, and Arbitrary Power, in the ordering of them when they are raised; but he must so behave himself to them, as to *Free-men*, according to the Laws made by themselves in their Representative in Parliament. And therefore are particular Laws made to that end, *against undue levying and discharging of Soldiers, and defaults in paying of them: as also against the Soldiers departing from their Service without Licence, or wasting their Arms, and such as wilfully absent themselves from Musters; as also for the preserving the Castles, Forts, Ships and Munition for War, from being with-holden from their due use, or from burning or destroying.*

Lastly, As touching the charge of the War, and pay of the Soldiers, it is evident, that in all offensive Wars the *Soldiers* were paid by the Crown, although they might be said in some manner to be in order to the defence and safety of the Nation; nevertheless, where the same was so apparent to the people, it was the common course in these times to have often Parliaments, and often Subsidies, which were no less in a good measure * satisfactory to the Crown for the Charges of the War, than Testimonies of the People's good acceptance of the government of Affairs, and so accepted at their hands. The particular Records will warrant all this. For of all the Wars in these times, (that of 88 excepted) not any of them were ever managed at the people's charge by *Contribution*, but by *Retribution*. So were these times, wherein the people, looking upon the Crown as under a kind of infirmity of Childhood or Womanhood, did therefore bear a kind of compassionate regard thereunto, without jealousy at Prerogative; and could condescend and allow the Crown its full Grains, and somewhat more; yea, more than was meet for some other Prince to desire, or the People to give up. And yet more happy were they†, wherein the Crown knew no interest but in dependence upon the people's good; and so understanding that, were rightly understood.

C H A P. XXXIX.

Of the Peace.

IT is but little that can be said of *Peace* in these times, wherein so little freedom was found from Foreign Pretensions, and Intestine Irregularities, or both; and yet the people were never more resolved against the former, nor more secure against the latter, and had God to Friend in all. But most apparently was this observable in the times of Queen *Elizabeth*, whose Government took up four parts of five of these times whereof we now treat. She was a compleat Conqueror of War and Treason, and therein the true Inheritor of the Fate of her Grandfather *Henry the Seventh*, with advantage; for she out-faced all dangers by her only presence, having thereof had more experience than any Princes that ever possessed her Throne: yet she was wise enough to beware against the future; considering her condition to be the last of her Line; that the next behind her was rather likely to trip up her heels than support her Train; that the Pope narrowly watched every opportunity; the distance between him and the Throne being no greater than the breadth of her only person. It may well therefore admit of excuse, if the Statute of the 25 of *Edward the Third* concerning *Treasons* did not give satisfaction; although therein if she were solicitous, her Subjects were more. Some kinds of offences were made *Treason* by Statute-laws, which formerly appeared not such, because they appeared not at all; and yet in the opinion of her people, the Queen was too slack in the making, and more slack in the execution of them. The people had engaged themselves deeply against the Queen of *Scots*, and it was not safe for them to go back; they go yet deeper, and without any positive Authority, leading the way, they enter into an *Association* amongst themselves for the Queen's safety; and it was well liked by the Queen, because she knew it was well meant, although by some it was mistaken. Nevertheless, to take away all exception, a Law is made in pursuance thereof, and so the work is reduced under an ordinary rate,^{27 Eliz. c. 1.} though the publick danger was such, as might well have digested an extraordinary undertaking.

I intend not to enter into the particulars of these *Treasons* of the new stamp, because they are but temporary, and in their ultimate reach tend only to the safeguard of the Queen's person, in order to the intentionary sense of the Statute of 25 *Edw. 3.* although not within the explicate words of that Law. Only this is observable, that though the times were full of malice, yet was not all malice looked upon as fatal, nor every expression thereof *Treason*, or *privity* thereto, although the Crown it self was not a little concerned therein; but reduced them to an inferior degree, called *Misprision*; as if they were willing rather to construe undertakings for mistakings, and thereby over-look much of the Malignity of these Times, than to make strict inquisition into every *Punctilio* of offence.

As touching *Felony*, the rules were various; some were of a new Original, as; ^{Eliz. c. 20.} that of *Gypsies*; others formerly such, afterwards laid aside, are now revived with advantage, as *Conjuration* and *Buggery*: But *imbezelling* by Servants of their Masters Goods, made *Felony* for a time by *Edward the Sixth*, is by Queen *Elizabeth* made

2 Eliz. c. 29
3 Eliz. c. 10

Cap. 16.

made perpetual. Some *Felonies* are made such within a certain precinct, as *Man-stealers*, and other Crimes upon the *Scotish Borders*. Others formerly made *Felony*, are now unmade; as that concerning *Prophecies*: and divers formerly protected under the refuge of *Clergy*, are now barred of that reserve: such as are those that command, counsel, or hire others to commit *petty Treason*, *Murder*, or *Robbery*, 4 & 5 *Phil. & Mar. cap. 4.* *Stealers of Horses, Geldings, or Mares*, 2 *E. 6. cap. 33.* *Robbers of Houses, Booth or Tent, by Day or Night*, 5 *E. 6. cap. 9.* *Pick-pockets, or Cutpurses*, 8 *Eliz. cap. 4.* And *Woman-stealers*, 39 *Eliz. cap. 9.* And some Crimes made *Felony* impeachable only within a certain time, and not upon a cool suit. So as upon the whole heap of Account, the Zeal of the times will appear to be more hot, by how much iniquity appeared more heinous; and that wicked men waxed worse, as the times waxed better. More particulars of this nature, and of other Offences of inferiour note, might be super-added: as also of *Laws*, of alteration and amendment of *Process* and *Trial*, and of *Common Assurance* and *Conveyance* of *Estates*, of particular *Revenues*. All which might be insisted upon, if need were, to clear out yet further the conclusion of the whole matter; which I hasten to accomplish, led on by a natural motion, that grows in speed, the nigher it comes to its end.

CHAP. XL.

A Summary Conclusion upon the whole matter.

IN the stating of this whole account, I shall first glance upon the natural Constitution of the people of *England*, and then gather up the scattered Notions into one form; because the one doth not a little illustrate the other, and shew the same to be radical, and not by any forced inoculation.

The people are of a middle temper, according to their Climate: the *Northern Melancholy*, and the *Southern Choler*, meeting in their general Constitution, doth render them ingenious and active: which nourished also under the wings of Liberty, inspires a Courage generous, and not soon out of breath. Active they are, and so nigh to pure act, that nothing hurts them more than much quiet; of which they had little experience from their first transmigration till the time of King *James*; but ever were at work either in building (as before the *Norman* times) or after in repairing their ruins occasioned by tempestuous pretensions from *Rome* and Foreign Princes, or by Earthquakes of Civil Contention about the Title between the two Houses of *York* and *Lancaster*, or intrenchments of the Crown upon the Liberty of the people. But King *James* conquering all enmity, spake Peace abroad, and sang Lullaby at home. Yet like a dead Calm in a hot Spring, treasured up in store sad distempers against a back-Winter. Their ingenuity will not allow them to be excellent at the Cheat; but are rather subject in that kind to take than give: and supposing others as open-hearted as themselves, are many times in Treaties over-matched by them whom they over-match in Arms. Upon the same account they are neither imperious over those beneath, nor stubborn against them above; but can well discern both person and time. Man, Woman, or Child, all is one with them, they will honour *Majesty* where-ever they see it.

And

And of the twain, tender it more when they see it set upon infirmity : as if they knew how to command themselves only in order to the publick good.

Nevertheless, they love much to be *free*. When they were under awe of the Pope's Curse, they bore off designs by the head and shoulders ; but afterwards, by watchfulness and foresight : and having attained a light in Religion, that will own their Liberties, of them both they make up one Garland not to be touched by any rude hand ; but as if it were the bird of the eye, the whole body startles forthwith ; the Alarm is soon given and taken ; and whether high or low, none are spared that stand in their way. This they do owe to the *Eastern* People, from whom they fetch their Pedigree. So as the only way to conquer them, is to let them have their *Liberties* ; for like some Horses, they are good for carriage, so long as their Burdens are easy, and sit loose upon them ; but if too close girt, they will break all, or cast their load, or die. And therefore Queen *Elizabeth* gained much to the Crown by fair carriage, good words and cleanly conveyance ; which was not soon discovered, nor easily parted with : But *Henry* the Eighth by height of spirit and great noise ; and therefore was no sooner off the Stage, but what was gotten by the snatch was lost by the catch, and things soon returned into their ancient posture again.

The first Government of the people before their departure out of *Germany*, was in the two States of *Lords* and *Commons*. The *Clergy* came not into pomp and power till *Austin's* time, and soon came to the height of a *third State* appendent to the former, and so continued till *Henry* the Eighth's time : Then they began to decay in power, and in Queen *Elizabeth's* time utterly lost the same ; and so they can no longer be called a *State*, although they still keep state.

The two States of *Lords* and *Commons* in their Transmigration, being then in the nature of an Army of Soldiers, had a General by their *Election* ; under whom, after they had obtained a peaceable settling, they named him anew by the name of *Konning*, or the Wise Man ; for then was Wisdom more necessary than Valour. But after the *Clergy* had won the day, and this *Konning* had submitted himself and his people to their Ghostly Father, they baptized him by a new name of *Rex* ; and so he is stiled in all written Monuments which we owe only to *Ecclesiasticks* ; although the Vulgar held their appellation still, which by contraction, or rather corruption, did at length arrive into the word *King* ; a notion which as often changeth the sense as the air ; some making the person all in all, others some in all, and some nothing at all but a complement of State. The *Clergy* gave him his Title in the first sense ; and are willing he should have a power over the Estates, in order to their design, which then was to rule the King, and by him all his People ; he doing what he listeth with them, and the *Clergy* the like with him. The *Saxons* take the word in the second sense ; for though they had put upon the Commonwealth one Head, and on that one Head one Crown, yet unto that Head did belong many Eyes, and many Brains ; and nothing being done but by the *common Sense*, a power is left to him much like to that of the outward Members, *i. e.* *Executory*.

In time of *War* how unruly soever the humours be, yet must the Law be his rule : He cannot engage the people either to make, continue, or determine any *offensive War* without their consent ; nor compel them to arm themselves, nor

The Conclusion.

command them out of their Counties for *War*, or impose Military Charge upon them against their free consent, or contrary to the known Law.

In calmer times much rather, he can neither make new Laws, nor alter the old ; form new Judicatories, Writs, Process, Judgments, or new Executions, nor inable or disable any Conveyances of Estates. He may seem possessed of more power in Church-government, yet *De jure*, can neither make nor alter Doctrine, or Worship, or Government in the Church ; nor grant Dispensations, or Licences Ecclesiastical ; nor Commissions of Jurisdiction, other than according to the Law. And as a close to all, by one *Oath* taken at the Coronation, he not only giveth to the people security of the Peace and good behaviour, but beareth witness that he oweth *Allegiance* both to the Law and the People ; different from that of the people's in this, that the King's *Allegiance* is due to the Law that is originally from the People's *Election* ; but the People's to the King, under a Law of their own framing.

This leadeth on the consideration of a higher degree of power than that of Kings. For though *Law*, as touching morality in the general, be of heavenly Birth ; yet the positive Laws arising from common Prudence concerning the Honour, Peace, and Profit of every Nation, are formed by human constitution, and are therefore called *Honestæ*, or *justæ*, because by common vote they are so esteemed, and not because any one man supposeth them to be such. The words of the Summons to the Parliament doth hold for this, *Que de communi consilio ordinari contigerint* ; and the words in the Coronation-oath, *Quas vulgus elegerit*, do speak no less ; whether they be taken in the Preterperfect-tense, or the Future-tense, the conclusion will be the same. True it is, that in all, Kings are supposed as present ; yet is not that valuable in the point of Counsel, which is the foundation of the positive Law. For as the best things under heaven are subject to infirmity ; so Kings either short or beyond in Age or Wit, or possibly given over to their lusts, or sick, or absent, (in all which the name of a King adds little more to the Law than a sound) yet all the while the Government is maintained with as much honour and power, as under the most wise and well-disposed King that ever blessed Throne.

This is done in the *Convention of States*, which in the first times consisted of Individuals, rather than Specificals. The great men doubtless did many things even before they saw the *English* shore ; that *Tacitus* noteth : yet in the *publick Convention* of all, did nothing alone, till of one House they became-two. The particular time of the separation is uncertain, and the occasion more : It may be the *great Lords* thought the mysteries of State too sacred to be debated before the vulgar, lest they should grow into curiosity : Possibly also might the *Commons* in their debates with the *great men* absent, that themselves might more freely vote without angering their great Lords. Nevertheless the *Royal Assent* is ever given in the joint Convention of all. But how a double *Negative* should rest in the house of *Lords*, one originally in themselves, the other in the sole person of the King, (whenas in no case is any Negative found upon Record, but a modest waving the answer of such things as the King likes not) is to me a mystery, if it be not cleared to be by Usurpation. For it is beyond reach, why that which is once by the Representative of the People determined to be *Honestum*, should be dis-determined by one or a few, whose Counsels are for the most part but Notionary, and grounded upon private inconveniencies, and not upon experimentals of most publick concernment ; or that the *veult*, or *Soit fait*, which formerly held the room only of a *Manifesto* of
of

of the *Regal Will* to execute the Law then made (as his Coronation-Oath to execute all Laws formerly established) should be taken to be a determination of the *justness* or *bonesty* of the thing: Whenas this *Royal Assent* is many times given by a King that knows no difference between good and evil, and is never competent judge in matters that in his opinion do fall into contradistinction between his own private interest, and the benefit of the people.

However unequal it may seem, yet both that and other advantages were gained by the *House of Lords*, after the separation was once made, as many of the ancient Statutes (by them only made) do sufficiently hold forth; which although in the general they do concern matters of *Judicature*, wherein the Lords originally had the greatest share: yet other things also escaped the *Common Vote*, which in after-ages they recovered into their consideration again. And the condition of the people in those times did principally conduce hereunto: For until the *Norman* times were somewhat settled, the former Ages had ever been uncertain in the changes between War and Peace, which maintained the distance between the Lords and their Tenants, and the authority of the one over the other, favouring of the more absolute command in War. And after that the Sword was turned into the Ploughshare, the distance is established by compact of *Tenure* by Service, under peril of default, although in a different degree; for the *Service of a Knight*, as more eminent in War, so in Peace it raised the mind to a regard of publick Peace: but *the service of the Plough* supporting all, is underneath all, yet still under the common condition of *Freemen* equally as the *Knight*. *Peace* now had scarcely exceeded its minority, before it brought forth the unhappy birth of Ambition: Kings would be more absolute, and *Lords* more Lordly; the *Commons* left far behind, seldom come into mention amongst the publick Acts of State, and as useless set aside. This was the lowest ebb that ever the *Commonage* of *England* indured, which continued till Ambition brought on Contention amongst the *Great Men*, and thence the *Barons Wars*, wherein the *Commons* parting asunder; some holding for the King, who promised them Liberty from their *Lords*; others siding with the *Lords*, who promised them Liberty from the *King*; they became so minded of their *Liberties*, that in the conclusion they come off upon better advantage for their *Liberties* than either *King* or *Lords*, who all were losers before their reckoning was fully made.

These Wars had by experience made the King sensible of the smart of the *Lords* great interest with the people, and pointed him to the pin upon which the same did hang; to take which away, a design is contrived to advance the value of the *Commoners*, and to level the *Peerage*, that they both may draw in one equal yoke the Chariot of *Prerogative*. The power of the *Commons* in publick Councils was of some efficacy, but not much honour, for their meetings were tumultuary; time brought forth a cure hereof, the flowers of the people are by *election* sent to be the *Representative*, and so the *Lords* are match'd, if not over-match'd; the people less admiring the *Lords* and more regarding themselves. This was but a dazzle, an Eclipse ensues; for Kings having duly eyed the nature of *Tenure* between the *Lords* and *Commons*, look upon it as an Out-work or Block-house in their way of approach: Their next endeavour is therefore to gain the *Knighthood* of *England* within the compass of their own *Fee*, and so by priority to have their *Service*, as often as need should require, by a trick in Law, as well for their own safety in time of War, as for their benefit in time of Peace. This was a Work of a

continuing nature, and commended to successors to accomplish by degrees, that the whole *Knighthood* of *England* is become no more the *Lords* till Kings be first served. And thus the power of the People is wholly devolved into the King's Command; and the Lords must now stand alone, having no other foundation than the affections of the People gained by beneficence of Neighbourhood and ordinary Society, which commonly ingratiates the inferiour rank of men to those of higher degree, especially such of them as affect to be popular. *Henry* the Seventh found out this Sore, and taught his Successors the way to avoid that occasion of Jealousy, by calling up such considerable men to attend the Court, without other Wages but fruitless hopes; or under colour of honour to be had by Kings from the presence of such great men in their great Trains; or of other service of special note to be done only by men of so high accomplishment. And by this means *Lordship*, once bringing therewith both Authority and Power unto Kings (before Kings grew jealous of their greatness) in these latter days is become a meer Jelly; and neither able to serve the interest of Kings (if the people should bestir themselves) nor their own any longer. Henceforth the *Commons* of *England* are no mean persons, and their *Representative* of such concernment, as if Kings will have them to observe him, he must serve them with their Liberties and Laws; and every one the publick good of the people. No man's work is beneath, no man's above it; the best honour of the King's work is to be *Nobilis servitus*, (as *Antigonus* said to his Son) or in plain *English*, *Supreme Service* above all, and to the whole. I now conclude: As I found this Nation a *Commonwealth*, so I leave it, and so may it be for ever; and so it will be, if we (i. e. *Prince and People*) may attain the happiness of our Forefathers the ancient Saxons, *Quilibet contentus sorte propria*. [Do each of us live content with our *Proper Rights*.]

Ælian.
lib. 2.
Var. Hist.
c. 20. Tacit.

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